

THE GEORGE WASHINGTON UNIVERSITY
Washington, D.C.

MINUTES OF THE SPECIAL MEETING
OF THE FACULTY SENATE HELD ON
APRIL 27, 2001, IN THE MARVIN CENTER,
800 21st STREET, NW, ROOM 403

The meeting was called to order by Vice President Lehman at 2:15 p.m.

Present: President Trachtenberg, Vice President Lehman, Interim Registrar Terpstra, and Parliamentarian Pagel; Dean Phillips; Professors Boswell, Castleberry, Divita, Duff, Gallo, Griffith, Haque, Harrington, Lindahl, Mergen, Park, Pelzman, Robinson, Simon, Stephanic, Wilmarth, and Yezer

Absent: Deans Futrell, Harding, Lefton, Riegelman, Tong, Williams, and Young; Professors Captain, Cawley, Hoare, Johnston, McAleavey, Nagy, Thornton, and Zaghloul

RESOLUTIONS

RESOLUTION 00/6, "A RESOLUTION ON THE REVISED DRAFT OF
THE SEXUAL HARASSMENT POLICIES AND PROCEDURES"

Professor Robinson, Chair of the Committee on Professional Ethics and Academic Freedom (PEAF) moved the following amendments to Resolution 00/6:

- (1) In the Sixth WHEREAS Clause, Line 4, replace the word "rejected" with the words "substantially modified" to more accurately describe the process that occurred.
- (2) In the Seventh WHEREAS Clause, Letter C, add the word "all" after the word "discover," replace the word "documents" with the word "information," and delete the phrase "and the names of adverse witnesses." This change was being made in reference to the exchange of information before a hearing; the Administration document did not provide full protection against adverse use of hearsay evidence (information). That is, oral statements that had been made would not be required; this would include oral statements made to the Coordinator. The Administration document, she said, would only cover written documents.
- (3) In the Ninth WHEREAS Clause, replace the word "counsel" with the words "faculty members," because the term "counsel" might imply "formal representation," when, in fact, faculty members were only speaking on their own behalf.

The motion was seconded. The question was called, and the Robinson amendments were passed.

With respect to Resolution 00/6 itself, Professor Robinson reiterated its purpose:

1. It addresses the process with respect to the Faculty's expectations and commitment to "shared governance" and the fact that long-established procedures have not been followed by the administration with respect to its unilateral changes to a document approved by the Faculty Senate. We need to follow that procedure.
2. Secondly, and most importantly, the Senate is actually being asked to stand by its own work. The Senate is not asking the Administration, she said, to look at a new document; it is asking the Administration to reaffirm support of the Senate Policy passed in May, 2000, because the Senate believes the revisions remove important procedural protections, and they do not meet with Senate approval.

In conclusion, Professor Robinson said that the Resolution is simply an affirmation of the Committee's view, supported by the Policy the Faculty Senate approved in May, 2000, that the removal of procedural protections was not being done with the Faculty Senate's approval. Professor Robinson then yielded the floor to Professor Arthur E. Wilmarth for his comments.

Professor Wilmarth distributed a Memorandum dated April 27, 2001, which described the important differences between the (1) the draft of the Sexual Harassment Policy and Procedures as approved by the Faculty Senate on May 5, 2000, and (2) the Administration's draft of the Policy and Procedures as most recently revised by the Verner Liipfert law firm on March 30, 2001. He then summarized the key differences between the two proposed Policies, emphasizing that the Administration's draft had deleted a number of vital due process protections that are provided by the Faculty Senate document. (The Memorandum dated April 27, 2001, regarding Proposed Sexual Harassment Policy and Procedures - Key Differences between the Faculty Senate and Administration Drafts, is attached and made a part of these Minutes.)

In speaking against the Administration's document, Professor Wilmarth cited guidelines published by the Office of Civil Rights of the U.S. Department of Education and a recent federal court decision, Saxe v. State College area School District, 240 F.3d 200 (3d Cir. 2001). In Professor Wilmarth's view, these legal authorities clearly indicate that an educational institution must protect rights of free expression and due process when it adopts a sexual harassment policy.

Accordingly, Professor Wilmarth contended that, if the University chose to encroach upon the faculty's right of free expression or upon due process, it was doing so entirely upon its own motion and was under no legal obligation to do so. His own view was that the proposed Procedures could only be described as Kafkaesque, and he read a few passages from The Trial to make his point. Professor Wilmarth strongly urged the Senate members to stand up and affirm that they would not accept the infringements upon academic freedom and due process contained in the Administration's document. He concluded by saying that if the Senate were not willing to stand up and be counted, due process and the right of free expression would cease to be protected at GW University as of this day.

Professor Boswell then asked for the privilege of the floor for Vice President Dennis Blumer, the University's General Counsel. The privilege of the floor was granted.

Vice President Blumer said that he wanted to put the revised draft before the Senate in some context, and observed that the draft now under consideration had seen many changes. The reason for the many changes, he said, was because the issues were important, and the views on these issues less than uniform. He said that it was a document produced by the community. He then described the procedure by which the Policy and Procedures had been developed by parties inside, and outside of, the University. The draft before the Senate, Vice President Blumer continued, was a product of all of the discussions – an amalgam of the Senate's recommended document, together with those changes counsel believed necessary for the document to pass legal muster.

Vice President Blumer told the Faculty Senate that the proposed policy, including the legally mandated changes, was clearly in the mainstream of policies adopted by major universities around the country. He added that the Verner-Liipfert law firm had analyzed a number of policies from other institutions, and this analysis was distributed to the Senate. Vice President Blumer pointed out that the proposed policy contains a high number of procedural safeguards for both complainant and respondent as set forth in the representative list prepared by Outside Counsel and also distributed to the Senate.

Finally, Vice President Blumer said that any policy, administered unfairly, would certainly yield unfair results, and he promised his Office would do its part if the proposed Policy were approved, by administering it fairly, competently, and forthrightly, as had been done for the past three years with the Interim Sexual Harassment Policy. And, he added, because the Policy could touch upon and affect matters of academic freedom and individual rights, the Policy would be under continuing and close review with the passage of time, so that any case law or regulatory guidance that might become available could be considered in any subsequent amendments to the Policy.

Professor Gallo then spoke in favor of rejecting Resolution 00/6. She began by enumerating the WHEREAS Clauses in Resolution 00/6, and commenting upon the content of twelve of them. In speaking against the Resolution, Professor Gallo said that the outcry against the Sexual Harassment Policy and Procedures (particularly the Procedures) which began in January 2000 and which has continued against the present draft Policy, was without merit and not broadly reflective of the faculty the Senate represents. She noted that procedural issues, or issues of due process, had not arisen in the previous two years during which the Policy and Procedures were discussed and arose only after the ad hoc committee's draft was completed. The Faculty Senate identified no procedural issues when it referred the Interim Policy and Procedures to the ad hoc committee. Two generations of the Professional Ethics and Academic Freedom Committee that reviewed the Interim Policy and Procedures suggested only one substantive change to the Procedures. Similarly, she said, lengthy consultation between faculty and the ad hoc committee revealed concerns about the Policy, but not the Procedures, and

when the ad hoc committee circulated its work and solicited comments, none were forthcoming that related to Procedures.

Professor Gallo went on to say that it was puzzling that with all of these opportunities for earlier input, that concern about the Procedures had materialized only recently. She said that she thought the reason was simple--that the present concern expressed about the procedures was a smoke-screen to camouflage a policy issue, which was the inclusion, by the ad hoc committee, of classroom conduct as a subject for a sexual harassment claim. Consequently, those that favor this Resolution wish now to set the procedural bar so high to protect faculty, she said, that the Policy and Procedures would be rendered useless for the remainder of the University community, where most sexual harassment claims originate. Further, a student with a meritable claim of harassment would be discouraged from coming forward, or if they did, the claim would unlikely lead to a finding of harassment against the faculty member. (The complete text of Professor Gallo's comments are appended to and made part of these Minutes.)

Professor Park said that he had served on the Senate many times since coming to GW, starting as Parliamentarian, and then serving in the Senate, and on various committees, and in all that time, he said that he didn't know a single issue that was so emotionally intense for the faculty to consider as this one. It was, he thought, not a simple issue, but a very difficult one. Since he had taught administrative law since his first year at GW, he said that due process was central in these sorts of matters, and the courts have construed due process to be fairness under the circumstances. As interpreted over the years without significant deviation, Professor Park continued, due process includes adequate notice and the opportunity to make an adequate argument for oneself, and to respond to and confront the evidence. So, he said that he thought that there was a set of traditional guidelines as to fairness to which the Senate could refer confidently without feeling that somehow the system was being burdened by impossible procedures. On the other hand, he said, sensitivity to the interests of students, particularly female students who might be intimidated, who are in a power relationship with members of the faculty, or even with lab assistants, was necessary, and consideration had to be given both to the student's reluctance to complain and to anxiety about being identified. He noted that many sexual assaults and incidents of spousal abuse go unreported because people are afraid of the embarrassment, and of being pilloried or cross-examined by lawyers in a way that they would be essentially savaged without justification. However, he continued, the Senate needed to proceed in a way that would provide elements of counseling, preliminary judgments that are fair to everyone, and in a context that was fair. Fairness, he said, goes in all directions, and ultimately any Policy must be fair to the institution, the faculty, the students, and the staff employees, and thus discharge the duty of all members of the campus community to one another. Professor Park then noted that yet another element has recently inserted itself into the picture with local media interest in the subject of sexual harassment and the Senate's debate on the subject. With heightened awareness, he said, it is particularly important to set the stage for a process that has integrity that the Senate can defend, and not settle upon a process as Columbia University did, with a policy recklessly tilted in one direction.

In order to achieve the goal of fairness to all constituencies, Professor Park said that the Senate must also rely upon the expertise of the University Counsel, Outside Counsel, and faculty members who are experts, and he reminded the Senate of Professor John Banzhaf's expertise on the issue and his participation in the Senate debate last year on this Policy. Professor Banzhaf, he said, is an individual who has litigated these issues a number of times, but he is also sensitive to the academic institutional interest, as well as the student interest, of which he has been a particular advocate. He knew, he said, that Professor Banzhaf was not someone who was trying to isolate, degrade, humiliate, or frustrate legitimate student complaints. Professor Park then said that he hoped that the Senate could express its appreciation to Professor Banzhaf on the record for his contributions on the issue, and if possible, make the floor available to him to comment on responsive questions when his expertise would be useful.

Professor Pelzman followed up by noting that in the administration documents, several terms recurred, among them, "legally mandated," "mainstream" and "effective." In that context, he asked that the University Counsel delineate what was not effective in the Sexual Harassment Policy which does not provide the accused with details of the accusation. Why, he asked, would the Policy be effective if only one side – the respondent and Coordinator knew the details of the accusation? It seemed to him, he said, that any Policy had to be effective both ways, and it was not clear why barring this information rendered the Policy more effective.

Secondly, Professor Pelzman said, there was the question of the hearing itself, or rather the lack in the proposed Policy of an opportunity for one. Professor Pelzman asked again why this provision would make the Policy more effective, and he noted that when the Senate's Executive Committee asked to have Outside Counsel meet with its own faculty members it had done so with the idea of seeking a compromise in mind. In order to consider such a compromise he said, the Executive Committee wanted Outside Counsel to show why the new version was more effective than the Senate-approved Policy, but this was not done. The major behavior modification that would take place if the proposed Policy were adopted, he said, would be a limit on free speech in the classroom, and he noted that faculty are supposed to challenge people in the classroom, not to provide them with Mickey Mouse explanations of issues. He concluded by saying that there was absolutely no reason to adopt the administration's version, since it had not been shown that the Senate's Policy fails to provide safety for the accuser.

Mr. Peter Pantaleo introduced himself as a partner in the law firm of Verner, Liipfert, Bernhard, McPherson and Hand, which firm had been retained to advise the University concerning the Sexual Harassment Policy and Procedures. Mr. Pantaleo summarized his background for the Senate, saying he was in charge of the Civil Rights and Appointments practice at Verner, Liipfert, and he had developed a subspecialty in assisting employers in what he termed "politically challenged environments" to develop and adopt sexual harassment and discrimination policies. Mr. Pantaleo said that his firm had drafted the sexual harassment policy for the United States Congress under its then General Counsel, Cheryl Lowe.

Mr. Pantaleo began by saying that although the phrase "sexual harassment" was being used to characterize the Policy under review, the term more appropriately used would be "civil

rights enforcement.” There were two federal laws in play here, he said, those being the Civil Rights Act of 1964, and the 1972 Amendments to the Education Act. There could be no debate that George Washington University was covered by both.

The Policy is not a Code, Mr. Pantaleo said, even though it has been referred to as such in much of the correspondence. He explained that a Code is a mandated set of rules that need to be followed, and that those rules, in the form of the laws cited above, had already been established. The University’s Policy, he said, was an attempt to provide guidance for the following of rules already established by Congress, promulgated by the EEOC and the Office of Civil Rights, and interpreted by the Courts. If classroom conduct were proscribed or limited, he said, this was not a result of the University Policy, it was a result of federal discrimination statutes. Moreover, he added, the definition of sexual harassment continued to evolve e.g., just this week the Supreme Court had determined in a Title XII (which covers employment) case that “an occasional utterance or an offensive statement is not sexual harassment.” Mr. Pantaleo emphasized a second time that it is the law that is imposing this on GW, not Verner, Liipfert, and not the Policy as it has been drafted.

The Sexual Harassment Policy and Procedures, Mr. Pantaleo said, were an attempt to mitigate the impact of very aggressive civil rights law enforcement mechanisms, made necessary by 100 years of systemic discrimination in the United States. Mr. Pantaleo then explained quid pro quo harassment to the Senate, observing that in these cases the law imposed strict liability upon employers, whether they knew of or endorsed the conduct or not. This was because, in the employment context, the manager’s ability to promote is the employer’s ability, and his or her actions were therefore those of the employer. Mr. Pantaleo then explained hostile work environment harassment, saying that in the Faragher case, the Supreme Court determined they would always make the employer responsible for hostile environment harassment; however, employers could assert as an affirmative defense that they had a sexual harassment policy, and that that policy was effective, i.e., that people would use it. It is reasonable, he said, that a policy that people would use would take into account the fact that sexual harassment is not about sex, it is about power, and that people who hold the power also hold the ability to remedy the harassment. Thus, he said, it was necessary for a sexual harassment policy to encourage people to come forward. If, he added, a complainant went to the sexual harassment coordinator and this resulted in the requirement of a written statement, which would be turned over to the employer, along with a variety of other procedural safeguards advocated by the Faculty Senate, he doubted very much that a court would be likely to find this procedure reasonable.

Mr. Pantaleo continued his discussion of the University’s absolute obligation to investigate allegations of sexual harassment and enforce its policy. Faculty members, as supervisors under the law, can bind the University as to liability. If an action is so serious that it meets the definition of actionable under Title VII, only if it is so severe or pervasive, or the behavior is so objectively offensive (according to the Supreme Court) as to alter the conditions of the victim’s employment, that is what is prohibited. The law requires investigation of all allegations, he said, even if the alleged victim does not wish to come forward. In some cases, it may not even be the victim who makes the complaint, and Mr. Pantaleo described a scenario in

which four male students were aware of a female student's "trade for a grade" relationship with the faculty member teaching the class. In such cases, he said, the details of an allegation may involve third parties and requiring a written statement may inhibit complaints and the University may be deemed unreasonable in requiring complainants to do so. Finally, he said, there was the issue of effectiveness, and in order to be effective, a policy would be one that people are likely to use, and in fact will use, and that policy would not put procedural burdens in the complainant's way in a manner that will discourage them from using the policy.

Professor Pelzman asked why the policy did not encourage hearsay, and Mr. Pantaleo responded that it did, because the law encourages hearsay. Mr. Pantaleo added that the University's obligation was to act upon information it had received, and that might, by definition, be hearsay, and he referred Professor Pelzman to Page 4 of the Policy for a detailed explanation on that point. Mr. Pantaleo also pointed out that the Policy specifically provides that nothing in the Sexual Harassment Policy and Procedures could be used to revoke a faculty member's right to pursue a grievance under the Faculty Code.

Discussion followed by Professor Pelzman and Mr. Pantaleo. Mr. Pantaleo pointed out that the Administration proposal was very similar to the Interim Policy in place for the past three years, and he said he thought it might not be wise to ignore three years of successful experience with a Policy that contained some of the same procedures that were now being objected to. As Outside Counsel for the University, Mr. Pantaleo said, in order for the Policy to be effective, it would have to be inviting, so that the Policy would mitigate damage and be a legitimate risk reduction tool for the University and individual managers who would have to deal with sexual harassment complaints.

Professor Griffith asked Mr. Pantaleo to respond to the question of what happens once a party reports to a supervisory official, and that supervisory official imposes some sort of disciplinary sanction, that is, how faculty can protect their own rights in this kind of situation. He said he could certainly see, as Professor Gallo had argued, that it was reasonable from the faculty point of view that there might be an informal process in which there were not a record made. But once a faculty member has suffered an imposition which he thinks unfair, Professor Griffith asked how a policy could be defended that would prohibit making available to the faculty member the details upon which he could mount an appeal. Mr. Pantaleo responded that the Policy specifically provides that when faculty proceed to the hearing level, faculty have access to information sufficient to formulate a response.

Professor Simon asked whose judgment that conclusion was based upon, and Mr. Pantaleo responded that he would say it was based on experience and history, and a judgment based on both the University and the alleged harasser. Discussion followed by Professors Pelzman, Simon, and Mr. Pantaleo on the importance of the effectiveness of a policy vs. due process rights.

[At 3:55 p.m. the meeting was adjourned because Room 403 was about to become unavailable, and the Senate reconvened in Room 310 of the Marvin Center at 4:15 p.m.]

Professor Robinson moved that debate be limited until 5:00 p.m., and the motion was seconded. A vote was taken, and the motion was approved.

Professor Griffith said that, while he thought that the Faculty Senate's version of the policy perhaps overprotected the faculty, the administration's policy would seem to overprotect the plaintiff (victim). He said that it seemed to him that Mr. Pantaleo had not really answered the question of why concealing information from an accused faculty member would be necessary to make the harassment policy effective.

Mr. Pantaleo responded that under the policy, the sexual harassment coordinator would do a preliminary consultation with a complainant, and investigate the matter. A report would be written to a responsible University official, which is required under both Title IX and Title VII. The responsible official would be the individual who would take disciplinary action if necessary or indicated. The real dispute, it seemed to Mr. Pantaleo, was that the Harassment Policy does not mandate turning over of 100% of the information, but it does not preclude it either. And he added, any policy would fail no matter what its provisions if it was not consistently administered in good faith. One fact was irrefutable, he said, and that is that a policy virtually identical to the Verner, Liipfert draft -- the Interim Sexual Harassment Policy -- has been in place for some three, almost four years, and the problems identified in Resolution 00/6 have not come to pass, and has not resulted in the wrecked careers of administrators or faculty members who were unfairly railroaded by the existing policy.

Professor Banzhaf asked Mr. Pantaleo about an ongoing investigation at the University concerning remarks apparently directed in a class toward female students by a faculty member, and he said that the investigation had been going on for nearly a month. Professor Banzhaf asked Mr. Pantaleo to comment on this, as the Princeton policy which Mr. Pantaleo commended to the University requires investigations to be completed within two weeks. Mr. Pantaleo responded that he had no knowledge of the investigation in question.

Professor Banzhaf then asked if anyone in the room could answer his question. In response, Professor Gallo said that no one could answer on behalf of the administration, and that she had been told by the Sexual Harassment Coordinator that the nature of the case to which Professor Banzhaf was referring had been misrepresented, firstly, and secondly, the case to which Professor Banzhaf was referring had not proceeded to the point where it could be discussed, and she applauded maintenance of confidentiality in this case. Professor Banzhaf then said he didn't think Mr. Pantaleo should be arguing that the Harassment Policy was a wonderful policy if Mr. Pantaleo did not know what was going on. Mr. Pantaleo responded by saying that the fact that no one yet knows about the impending investigation indicated to him that things are working as they ought to, and would tend to negate Professor Banzhaf's concern that a faculty member's career would be ruined under the Harassment Policy.

Professor Duff said that he understood the need to protect the anonymity of victims, but that it seemed to him that some procedural protections for faculty present in the Faculty Senate's version of the Policy had been removed, even though these deletions, he said, did not

appear to alter the effectiveness of the Policy. He asked why the passage had been removed which provided that "the file will not be revealed or released to any University authority outside the general counsel's office nor will it be used or otherwise affect any decisions regarding promotion, tenure, compensation or other" Particularly, he added, when there had been a consultation written up and stored in a file somewhere.

Mr. Pantaleo asked Messrs. Weitzner and Avitable (of Verner, Liipfert) to correct him if he was mistaken, but he thought the representations of confidentiality in the Policy were adequate.

Mr. Avitable said that he thought there was some concern that the University might need to take into account accumulative effects of allegations that might not initially on their own have warranted a disciplinary action, and he thought that the University did not want any inference to be drawn that just because something had previously not led to an investigation that those allegations might not in the light of subsequent events be taken into account and justified as future investigations. Clearly, he said, with the Policy, as it is currently written, there would not be any corrective action taken without some sort of investigation and the full procedures being utilized. He said that he did not think there is any risk, as Professor Banzhaf had suggested at one point, that there might be a circumstance where someone might have some adverse action taken against him in the future and perhaps not even know that the reason for that action is a hidden file somewhere. This was not, Mr. Avitable thought, a realistic interpretation of the Policy. It would be in the University's interest, he thought that, if the University believed there was sufficient conduct to give rise to corrective action, to go through the full investigation and impose corrective action after that.

Professor Duff said that it seemed to him that there could be more assurances given to the faculty about the confidentiality of unsubstantiated accusations, particularly if the accusations were frivolous or unfounded. He also asked Mr. Pantaleo why the vote required to find a respondent responsible for harassment had been changed from 4/5ths to a simple majority.

Mr. Pantaleo acknowledged that the composition of the panel and the voting requirements had been changed. He said it was concluded that a simple majority rather than four out of five voting (a super majority), was not impossible to achieve, but was too burdensome for an effective policy. This decision had been a judgment call, he said, because he thought that it would be extreme in a litigation setting to stand up in court and defend a policy that required four out of five people hearing a case to determine that an event had occurred. The Policy as a whole he said, went as far as it could reasonably go if the goal was to keep faculty, students, and the University out of court. In its totality, he said, the Policy has a very simple function —the vindication of the civil rights of students and staff by means of an internal mechanism that falls short of deploying the full force and violence of the government.

Professor Simon said he did not see how a faculty member could be charged under the Policy and not know the details of the accusation. Mr. Avitable responded that faculty members

were entitled to an allegation, and sufficient information to formulate a response. Professor Simon said he thought the first goal was to protect the University, and then, the faculty, and he asked why this was different than other legal matters. Messrs. Avitable and Pantaleo both said that it was because the Supreme Court had confirmed the necessity of this, as it said an institution would be strictly liable if it didn't have a policy. Mr. Pantaleo then said he hoped that the Senate would find the Verner, Liipfert draft policy as compelling as the Interim Policy now in place.

Professor Wilmarth noted the presence of Professors John Banzhaf, David Robinson, and Michael Selmi, all of the Law School, and offered them the privilege of the floor for comments.

Professor Banzhaf reminded the Senate that he had sent Verner, Liipfert a series of very specific questions based upon the letter Verner, Liipfert had given to the Senate at the very last minute, and he had asked for a response which he had shared with all Senate members. The response, he said, was not responsive, and the list of cases, almost all of which were not university cases, also was not responsive. None of those cases, he said, stood for the proposition that the University was required not to grant a hearing in sexual harassment cases. Another lawyer's trick which he had observed, he said, was similar to Perry Mason pulling something out of his briefcase in the last few moments, in that Verner, Liipfert had served the Senate two weeks ago with a large document, at the very last minute, and so there was no chance to debate the changes therein. As it turned out, these changes did not amount to very much, he said.

Professor Banzhaf pointed out that two weeks ago the Senate was told that the proposed Policy was in the mainstream, and Princeton and Stanford were cited as examples. Professor Banzhaf said he had examined and analyzed both institution's policies, and both were very different from GW's proposed policy. Then suddenly, he said, five new university policies were held up for comparison, and the Senate was asked to trust Outside Counsel's representations about them. Princeton and Stanford were suddenly forgotten. In fact, Professor Banzhaf said, he had received two calls from major organizations saying that they thought GW's proposed policy was worse than Columbia University's, which policy was at the bottom rung of policies nationwide.

Professor McAleavey asked if the Senate could know the names of the organizations to which Professor Banzhaf referred, and Professor Banzhaf responded that the information was given him in confidence, so he could not divulge it.

Professor Banzhaf continued by saying that he thought that it was somewhat ironic that GW University, which has just gone to court claiming violation of its First Amendment rights, due process rights, and infringement of academic freedom in a zoning matter, would impose these same burdens upon its own faculty in the form of the proposed harassment policy. By law, he said, the University could do what it wished, but if the Senate rejected the proposed policy and sent it back in favor of a new policy which was truly in the mainstream, then, he said, the faculty would protect itself. Professor Banzhaf then volunteered to analyze the policies of the five

new universities whose policies had been commended to the Senate without analysis that day by Counsel.

Professor David Robinson of the Law School spoke in support of Resolution 00/6. He began by observing that people who are not lawyers probably wonder why lawyers argue about what the law is. He continued, saying that the law here (re sexual harassment) was very unclear, and that reasonable people can take very different views as to what the law is. He said that he had looked at all of the cases cited by Verner, Liipfert in their various memoranda, and that he did not find that these cases supported Verner, Liipfert's position. He further observed that Outside Counsel had conceded that his primary background was not in university law, but employment law, and that while an employee discharged from an IBM or GE might get another job elsewhere the following day, that was not the case with faculty, to whom an adverse decision might mean the end of an entire academic career. Thus, the stakes for university "employees" were very high, he said.

In conclusion, Professor Robinson said that Outside Counsel's position seemed to be analogous to that of an insurer, who took the position that Counsel represented and had a duty only to the University Administration, not to the University's faculty, staff or students. Counsel's advice was analogous to an insurer restricting driving to 30 miles per hour, which would impose a significant burden on the driver, but would be protective of the insurer's economic interests.

Professor Robinson closed by saying that he could not imagine that the faculty would not stand up and announce that they could not support the proposed Policy, and he urged the Faculty Senate to support Resolution 00/6.

Professor Selmi spoke in favor of rejecting Resolution 00/6. He briefly outlined his background as a GW Law Professor teaching employment discrimination law, employment law, and civil rights legislation. In those courses, he said, he taught Title VII and Title IX, and had co-authored a case book involving civil rights legislation covering Title VII and Title IX, as well as writing extensively about discrimination. Professor Selmi said he had served as an attorney for the Justice Department in the Civil Rights Section, and that during the (George H.W.) Bush administration, he had defended sexual harassment complaints.

Professor Selmi said that he had reviewed some 50 Sexual Harassment policies of universities around the country, and that the Administration's proposed Policy, in fact, was consistent with what the law requires. Of the many things the GW faculty was requesting, there was no specific case law, for example on the composition or vote of hearing panels. Professor Selmi added that when he heard a Senator say he did not find the argument (for the Administration's Policy) compelling, that Senator was saying, in fact, that he did not find the law compelling; Professor Selmi said he would have thought that the Faculty Senate had an obligation to the faculty members, the students, and the University to follow the law seriously. The Policy did not seem to him, he added, to be a strong infringement upon academic freedom, and he urged the faculty to take into account the various interests of the University's

constituencies. Professor Selmi then cited the last page of a famous book, Democracy and Distrust, wherein the author said "Whenever someone is talking about how the legislators may pass laws that are like Nazi Germany and everything is Kafkaesque, well, that's the time you pick up your ball and go home – there isn't really much else you can argue about." Professor Selmi further observed that the author also made the point, that if it were the case that legislators started passing laws that mirrored those of Nazi Germany, then you have a much bigger problem than a sexual harassment policy, you then have a university that is led by Nazis. Professor Selmi concluded by saying that he hoped the Senate had some ability to believe the Administration's policy would be administered in good faith, as there was no way to eliminate some of the good faith required. Professor Selmi urged the Senate to reject Resolution 00/6 and adopt the policy of the administration.

Professor Park said he thought, as Professor Banzhaf did, that the response of Outside Counsel, with all due respect, had not been direct, and had not addressed the potential for a plan to be fair to faculty, as well as to students. He said it seemed to him Outside Counsel's job was to essentially protect all the diverse facets of University life, not just to reduce possible money judgments. Since he thought that the faculty has a professional and fiduciary concern about these matters, and he thought that some of the information given was misleading, he proceeded to comment on several items. First, he said that Outside Counsel's comment that the courts don't treat universities in any special way, nor have they carved out a special class for them with regard to Title VII and Title IX, is literally true, but the courts do take notice when a university is party to an action, particularly if there is a question of academic judgment, or a judgment about freedom in designing the curriculum. He said that in numerous cases of expulsions of students from state universities, courts have deferred to faculty judgments, as faculty are more competent than courts to determine these things. He added that the proposed Administration Policy seems to have been designed to give minimal attention to the faculty's judgment in regard to what is appropriate in a classroom situation.

Professor Park continued by saying he thought some of the cases cited by Outside Counsel, and Counsel's conclusion that these cases argued for a higher standard than many agencies and lower courts have been applying, argued rather more for the faculty's concerns than the administration's. The point that the University has had an Interim Sexual Harassment Policy for three years and the University has not yet had a judgment against it, he said, was not very persuasive, particularly since Counsel hadn't developed or shared a record to indicate the number of cases, documenting possible problems and how those problems were resolved. Professor Park said that he thought there might have been one or two cases considered under the Interim Policy.

Concerning information accumulated in the record in sexual harassment cases, Professor Park said that he was quite simply startled when Outside Counsel commented that the information would not be given out since it was to be aggregated – stored up. It seemed to him that that meant the University would accumulate complaints, and that all of this unsubstantiated information could be brought forward at an indefinite time in a future case, and this, he said, did not seem fair. Even worse, he said, was that this information not only would not be shared

with the accused, but it would be shared with department heads and others in the process of informal consultation. So, he said, there was this accumulation of negative information, which the faculty member had never had the opportunity to refute or deny; and this was a fundamental denial of due process, to fail to provide a faculty member the chance to voice his or her side of the story. Professor Park reiterated that due process was fundamental to adjudication and to a determination of the truth or falsity of allegations, and that, to put this off to a hearing at some undetermined time in the future was unfair, and that Counsel's arguments here were also unpersuasive.

Finally, as to Counsel's argument that the Supreme Court had not required disclosure of the information at issue, Professor Park observed that the Court had not required disclosure, but that they hadn't prohibited it either. The real question, he said, was whether the University could design a system that would be respectful of the students, staff and faculty members at the University and still permit a proper airing of charges. To say that this hasn't been required, he said, is not to say that it is forbidden, and nothing in Title VII or Title IX, as he saw it, prohibits this sort of opportunity to be heard. Professor Park concluded by saying that a more informal and open process would be more in keeping with the University's educational mission, and would seem to be a fairer process.

Professor Pelzman pointed out that the interests of the University and those of faculty are not always identical, and by inference, a Policy which solely protected the interests of one might very well not protect those of the other. Under the proposed Policy, he said, a faculty member could wake up in the year 2020 and discover that she or he had repeatedly been accused of harassing students, but would never have known the details of the unresolved accusations, nor would have had a chance at the time to refute them. This was unfair, he said, because if these accusations had been made in civil court, the faculty member could demand to know through the discovery process all of the details, but at GW, that would not be possible. The proposed Policy, he said, eliminates protections for faculty, and it does not add anything to the student's protections either; it is simply proposed to minimize potential liability to the University.

Professor Griffith then moved that the Fourth RESOLVING Clause of Resolution 00/6 be amended, as follows:

"The Faculty Senate ~~implores~~ urgently requests the University President to reject suspend acceptance of the Revised Draft and accept the May 5, 2000 recommendation of the Faculty Senate and direct the preparation, in consultation with the Faculty Senate, of a re-draft of the Sexual Harassment Policies and Procedures with the goal of more fairly balancing the procedural rights of the respondents with the creation of an appropriate process that does not discourage complainants.

The motion was seconded.

Professor Griffith then moved that the debate be extended for 10 more minutes, and his motion was seconded. A vote was taken, and the motion failed. The question was called on the Griffith amendment, and the amendment passed.

The question was then called on the original motion, as amended, and Resolution 00/6, as amended, was adopted by a vote of 15-0-1. (Resolution 00/6, as amended, is attached.)

ADJOURNMENT

Upon motion made and seconded, Vice President Lehman adjourned the meeting at 5:15 p.m.


Tim Terpstra
Secretary

A RESOLUTION ON THE
REVISED DRAFT OF THE SEXUAL HARASSMENT POLICIES AND PROCEDURES (00/6)

WHEREAS, on October 27, 1997 the Vice President for Academic Affairs forwarded a draft of the Sexual Harassment Policies and Procedures to the Faculty Senate for its review and consideration; and

WHEREAS, the policy includes proscription of not only quid-pro-quo harassment but also of conduct that has the "effect" of creating an "intimidating, hostile, or offensive academic or work environment;" and

WHEREAS, good faith discussion of important academic matters relating to issues of gender may have such an effect on some students, while being regarded as desirable by other students and by faculty; and

WHEREAS, the Faculty Senate and its committees and its subcommittees, together with an Ad Hoc Committee of representatives of both administration and faculty, with the assistance of outside counsel provided by the administration also considered the Sexual Harassment Policies and Procedures, issuing a January 10, 2000 draft, and, following intense criticism by faculty members, including many from the Law School, a modified March 30, 2000 draft; and

WHEREAS, the Faculty Senate at three meetings intensively considered the proposal and recommended further changes ; and

WHEREAS, the administration then retained an additional outside law firm to review the proposed Policy and Procedures, and the firm recommended that the procedures be changed back largely to the January 10 Ad Hoc Committee draft, even though that draft had been later rejected substantially modified by the Ad Hoc Committee, declared "deeply flawed" in a unanimous straw vote of 22 members of the Law School faculty and rejected by the Faculty Senate itself; and

WHEREAS, the administration's current "Revised Draft" eliminates basic fair process protections for those accused of harassment including:

- A. The right to a copy of the complaint
- B. The right to know the identity of the complainant
- C. The right to discover all adverse hearsay information, ~~documents and the names of adverse witnesses.~~
- D. The right to a hearing prior to the imposition of any sanction without consent of the

accused

E. The right to an independent, impartial decision-maker

F. The right to confront and question persons giving adverse information

G. The right to compel the attendance of witnesses, including the complainant, or to exclude evidence from persons unwilling or unable to appear

H. The clear indication that the University, not the accused, has the burden of proof

I. The right to a copy of the decision by the Coordinator, the special panel, or the University; and

WHEREAS, the Revised Draft is far less protective of the rights of faculty respondents than the Statement of Student Rights and Responsibilities, still to be applied in cases where students are the respondents; and

WHEREAS, the Faculty Senate has been advised by counsel faculty members from the Law School that the Revised Draft is not compelled by law, nor could government officials consistently with the Constitutional requirement of due process of law compel such procedures; and

WHEREAS, the "Revised Procedures" would force accused faculty members desiring to be afforded basic procedural rights to file civil actions against the University in court, thus subjecting the parties to unnecessary anxiety and expense, and

WHEREAS, an incorrect finding of sexual harassment may unjustly end an academic career; and

WHEREAS, the procedures would encourage risk-averse faculty to eliminate all controversial material relating to issues of gender from their syllabi and class discussions and to refrain from employment of research assistants of the opposite sex

NOW, THEREFORE, BE IT RESOLVED BY THE FACULTY SENATE OF THE GEORGE WASHINGTON UNIVERSITY THAT:

The Faculty Senate regards the Revised Draft as patently unfair to persons accused of sexual harassment.

The Faculty Senate believes the Revised Draft will chill freedom of academic expression and academic freedom.

The Faculty Senate withholds its formal approval of the Revised Draft

The Faculty Senate ~~implores~~ urgently requests the University President to ~~reject~~ suspend acceptance of

the Revised Draft and ~~accept the May 5, 2000 recommendation of the Faculty Senate and direct the preparation, in consultation with the Faculty Senate, of a re-draft of the Sexual Harassment Policies and Procedures with the goal of more fairly balancing the procedural rights of the respondents with the creation of an appropriate process that does not discourage complainants.~~

Approved by the Committee on Professional Ethics and Academic Freedom
January 26, 2001

Postponed, April 13, 2001, to Special Senate Meeting, April 27, 2001

Adopted, as amended, April 27, 2001, by the Faculty Senate

GEORGE WASHINGTON UNIVERSITY LAW SCHOOL
MEMORANDUM

TO: Members of the Faculty Senate regarding Resolution 00/6

FROM: Prof. Arthur E. Wilmarth, Jr.

RE: Proposed Sexual Harassment Policy and Procedures – Key Differences between the Faculty Senate and Administration Drafts

DATE: April 27, 2001

The purpose of this memorandum is to describe important differences between the (1) the draft of the Sexual Harassment Policy and Procedures as approved by the Faculty Senate on May 5, 2000, and (2) the Administration's draft of the Policy and Procedures, as most recently revised by the Verner Liipfert law firm on March 30, 2001. As shown below, the Administration's draft has deleted a number of vital due process protections that are provided by the Faculty Senate document.

1. Maintenance, Distribution and Use of Secret Negative Records resulting from "Consultations"

Under the Senate document (*see* Appendix A), the Coordinator prepares a confidential record of any "consultation," and that record is maintained in the University General Counsel's office. If the record includes the name of a person against whom an allegation of sexual harassment has been made, the following protections are provided: (a) the General Counsel's office must advise the accused person of the existence of the record, (b) the record may not be revealed or released to any University authority outside the General Counsel's office, and (c) the record may not be used to affect any employment-related decisions concerning the accused person, unless a finding of sexual harassment has been made in accordance with the Policy and Procedures.

Under the Administration draft, the General Counsel's office is not required to reveal to the accused person that an adverse record has been made as the result of a "consultation." Nor is the University Administration prevented from (i) sharing that secret record among its various offices, or (ii) using that secret record in taking any action related to the accused person's employment. Thus, as stated in Professor John Banzhaf's e-mail message of April 26, 2001, to members of the Faculty Senate, the Administration draft permits University officials, without any notice to the accused, to maintain, distribute and use "secret dossiers" resulting from a sexual harassment consultation.

2. Imposition of Sanctions based on Unilateral "Findings" Made during an "Informal Resolution Procedure" and Without any Hearing

Under the Senate document (*see* Appendix B), after an "informal resolution procedure" has begun, the Coordinator must obtain from the complainant a signed written statement or the Coordinator must prepare a written summary of the complaint. The Coordinator must provide the written statement or written summary of the complaint to the person accused of harassment. After the Coordinator completes her investigation, she reports on the matter to the responsible University official. However, an informal resolution procedures may *not* result in the imposition of a sanction *unless* the accused person *consents* to the sanction.

Under the Administration draft, the Coordinator will *not* provide the written statement or written summary of the complaint to the accused person. Instead, the Coordinator is only required to "inform the Respondent of the allegation in sufficient detail to permit an informed response." Following an investigation, the Coordinator will report her "findings" to the responsible University official. That official can then determine to impose sanctions *without* the consent of the accused person and *without* any hearing. Thus, as Professor Banzhaf notes, the Administration draft of Appendix B provides for "punishment based solely on [a] one-sided report."

3. Lack of any Guaranteed Right to a Hearing

Under the Senate document (*see* Appendix C), a person accused of sexual harassment has a guaranteed right to a formal hearing. This right results from the fact that the complainant or the University must initiate a formal hearing procedure to impose a sanction on an accused person who has *not* consented to a sanction after the "informal resolution procedure."

In contrast, under the Administration draft (*see* Appendix C, Parts A and E), the accused person would be required to request a hearing to contest a sanction that had been imposed *without* consent after the "informal resolution procedure." Moreover, the special panel can *summarily deny* a hearing if it decides that "the reasons presented for overturning or modifying the findings or recommendations of the Coordinator lack substantial merit." But the accused person has no effective means of challenging the Coordinator's "findings," because, as indicated above, the accused has no right to see either (i) the written statement or written summary of the complaint, or (ii) the Coordinator's "findings" or other results of her investigation.

Even more extraordinary is the fact that the responsible University official is *not*

required to give the accused person a copy of the special hearing panel's decision explaining why it has denied a hearing. As a result, the accused person's technical right to appeal the special hearing panel's decision to the Associate Vice President for Human resources is meaningless.

4. Administration Control of the Composition of the Hearing Panel

Under the Senate document (*see* Appendix C, Parts B and C), the faculty members included in the "pool" of hearing officers are appointed with the *joint approval* of the Vice President for Academic Affairs and the Faculty Senate Executive Committee. Faculty members in the pool are chosen for a special hearing panel by lot. Once chosen, a hearing panel member *cannot* be removed by the Administration.

In contrast, under the Administration draft, the Vice President for Academic Affairs has the *unilateral* right to appoint all faculty hearing officers after "consultation" with the Faculty Senate Executive Committee. In addition, (i) the Vice President for Academic Affairs has the "discretion" to remove any faculty hearing officer, and (ii) the Associate Vice President for Human Resources has the right (for "sound reasons") to remove any member of a special hearing panel at any time during a formal hearing procedure. As noted by Professor Banzhaf, these unilateral administrative powers create the clear potential for "juror tampering."

5. Inadequate Rights to Discovery

Under the Senate document (*see* Appendix C, Parts B.2 and E.1), an accused person has the right to discover "sufficient particularities as to the alleged facts" so that the accused "may reasonably investigate the charge and prepare his or her defense." This right of discovery is drawn verbatim from Part V.B.1 of the University's Statement of Student Rights and Responsibilities. In addition, under Paragraph 26 of the University's Code of Student Conduct, the accused student has the right to have "reasonable access to the case file." It should be noted that these student policies and procedures will govern any sexual harassment case in which both of the parties are students (*see* page 5 of the Policy and Procedures).

In contrast, under the Administration draft, an accused person has no pre-hearing discovery rights of any kind, except to know "the contents of and names of the authors of any written statement that may be introduced against him or her" (*see* Appendix, Part H.1). This right was also granted in the Senate document, and the inclusion of this right in Verner Liipfert's revised draft of 3/30/01 represents the *only* concession made by the Administration with respect to the due process concerns raised by the Faculty Senate. In

short, faculty members who are accused of sexual harassment by students will have substantially fewer pre-hearing discovery rights than students who are accused by students!

6. Composition and Decisions of Special Hearing Panels – Chilling Effect on Academic Freedom in Public Academic Settings

Under the Senate document (*see* Appendix C, Parts C.1 and H), the special hearing panel in a case brought by a student against a faculty member would consist of four faculty members and one student. A four-fifths vote would be required to convict the respondent. Impartiality would be reasonably assured by the fact that no faculty member of the hearing panel could teach in the department of the faculty respondent. The panel composition and required supermajority vote are vitally important to the preservation of academic freedom, since the Policy does *not* provide an absolute safe harbor for expression in the classroom and other academic settings. Instead, the Policy only exempts “expression that is *reasonably* designed or *reasonably* intended to contribute to academic inquiry, education or debate on issues of public concern” (page 2, emphasis added).

In contrast, in the same type of case, the Administration draft provides for a hearing panel consisting of two faculty members, two students and one staff member. Only a majority vote is required to convict the faculty respondent. Thus, in a case involving classroom or other public academic expression, a faculty respondent could be convicted of sexual harassment even though *both* faculty members on the hearing panel concluded that the expression met the “reasonably designed or reasonably intended” test.

The Policy provides for “termination of employment” as a potential sanction for sexual harassment, including harassment in a public academic setting. The following excerpt from the “Statement of Principles on Academic Freedom and Tenure,” jointly adopted by the American Association of University Professors and the Association of American Colleges and Universities, is therefore highly relevant:

“Termination for cause of a continuous appointment, or the dismissal for cause of a teacher previous to the expiration of a term appointment, should, if possible, be considered by both a faculty committee and the governing board of the institution. In all cases where the facts are in dispute, the accused teacher should be informed before the hearing in writing of the charges and should have the opportunity to be heard in his or her own defense by all bodies that pass judgment upon the case.”

Similarly, Paragraph 20(a) of the University's Code of Student Conduct provides that "Judicial Boards" convened to hear allegations of misconduct against a student will consist of at least three full-time students and no more than one faculty member or administrator.

7. Unlimited Admissibility of Hearsay Evidence without any Opportunity for Cross-Examination

Under the Senate document (*see* Appendix C, Part F), the special hearing panel must direct a person to testify if he or she has given evidence that has been considered by the panel. In addition, the panel must exclude information given by "persons able but unwilling to appear" at the hearing. These provisions guard against the introduction of hearsay evidence and allow the accused person to have a reasonable opportunity to cross-examine all witnesses presenting adverse evidence. While the Senate document does not compel persons to testify against their wishes, it does prevent the hearing panel from considering hearsay statements offered by anonymous sources.

In contrast, the Administration draft allows the hearing panel to consider and rely on hearsay evidence without any limitation. Thus, for example, the Coordinator could appear as an adverse witness against the accused and could present her investigative "findings" without disclosing any of her sources. While the Coordinator would be subject to cross-examination as a witness, the accused would have no meaningful way of testing the credibility or bias of the undisclosed sources who gave information secretly to the Coordinator.

8. No Right to Review the Special Hearing Panel's Decision or the Administration's Decision on Appeal

Under the Senate document (*see* Appendix C, Part H.4), no sanction could be issued against the accused, based on the special hearing panel's decision, unless the accused is given the right "to review all parts of the special panel report on which the sanction is based." In addition, the accused is given "a reasonable opportunity to reply before the sanction is imposed." Similarly, if the accused appeals to the responsible University Vice Presidents, the decision of those officials will be provided to the accused.

In contrast, under the Administration draft, the responsible University official may *refuse*, "in his or her discretion," to provide any portion of the special hearing panel's decision or the administrative appeal decision to the accused. Thus, the Administration draft would render nugatory the right of an accused faculty member (i) to appeal the special hearing panel's decision, or (ii) to file a grievance based on that decision and/or

the administrative appeal decision (*see* page 6). How can the accused prepare either an appeal or a grievance when he or she is not allowed to see the decision that served as the basis for imposing a sanction and/or denying an appeal?

I hope that these comments will be of assistance to the Faculty Senate's consideration of Resolution 00/6 at its meeting today.

A.E.W., Jr.

Faculty Senate Special Meeting, April 27, 2001

Professor Linda L. Gallo's Comments on the PEA Resolution (00/6)

Would you please number the WHEREAS clauses in rank order from 1-12? I wish to speak to some of these and this will simplify the process.

WHEREAS 2: This clause implies that we have the option to eliminate classroom conduct in our Policy. It is clear under existing law that classroom conduct can now be the subject of a harassment claim. There are no special exclusions for the classroom since the legal definition of sexual harassment does not differ with the context in which the alleged misconduct occurs. While academic freedom does not automatically trump a sexual harassment claim, the policy certainly embraces academic freedom on page 2, paragraph 2, where it is stated that "expression that is reasonably designed or reasonably intended to contribute to academic inquiry, education or debate on issues of public concern shall not be construed as sexual harassment."

WHEREAS 3: Discussion of important academic matters is protected by the Policy. I refer you again to the Policy statement on page 2, paragraph 2 which was just cited. In the remote chance that sexual harassment were alleged as a consequence of "good faith" discussion, the claim would stop at the sexual harassment coordinator who "would address and clarify the matter with the person" and "determine that no further action is necessary" as described in Appendix S-2, page 6. In fact, this is exactly what would happen in the example circulated to the Senate under the title "what could happen to you under the code." This is what would happen to you, which is nothing.

WHEREAS 4: While essentially accurate, I would point out that the ad hoc Committee never believed that the March 30 draft represented a significant improvement over the January 10 draft. In the interest of reaching consensus (what a dream), the ad hoc Committee compromised where possible on issues while staying within legal boundaries set by federal law. Many of the changes were agreed to by split votes.

WHEREAS 5 is accurate.

WHEREAS 6: There are technical errors in this Clause. The January 10 ad hoc Committee draft was not rejected by the Faculty Senate. The January 10 version was never considered by the Faculty Senate.

WHEREAS 8: There has been the repeated argument by some that the revised draft is less protective of the rights of respondents, specifically faculty, than the Code of Student Conduct, still to be applied where students are the respondents. There are two points to be made here.

Point 1: **WHEREAS #8** is only partially correct. The Code of Student Conduct applies in sexual harassment cases only when both the complainant and respondent are students. In mixed status cases, i.e., student/faculty, student/staff, the

university-wide Policy and Procedures apply. To further compare the two documents, when the respondent and complainant are both faculty, the Code of Student Conduct and the University-wide Policy and Procedures are quite comparable in that in the former the hearing panel is comprised of 5 students and 1 faculty or 1 administrator and in the latter the hearing panel is comprised of 4 faculty and 1 staff or 1 student. In other areas, the revised university-wide Policy and Procedures are more protective of the respondent than the Code of Student Conduct requiring substantial weight of the evidence vs. preponderance of the evidence for a finding of harassment, allowing legal representation for faculty vs. not allowing legal representation for students.

Point 2: There has been such a persistent tendency to compare the Procedures of the revised draft with the procedures in the Code of Student Conduct that I took the liberty of comparing the revised draft with another Senate and PEAFF-approved university policy which governs misconduct in research. Alleged misconduct in research, in my view, is far more serious than an allegation of sexual harassment because misconduct in research represents a deliberate act where sexual harassment may not be, and if proven, can certainly be career ending. What is the Senate and PEAFF-approved procedure? When an allegation of misconduct in research is made, the Associate Vice President for Research conducts an investigation. The investigation may lead to a formal inquiry as determined by the Associate Vice President for Research. If so, the Vice President for Academic Affairs will appoint an ad hoc committee to make a determination. The size of the committee and its composition are not specified. The accused may be advised but not represented by legal counsel. The person who raised the allegation may not be identifiable, but if known, is identified to the respondent. Compare this to what we are trying to do the Policy and Procedures Governing Sexual Harassment.

WHEREAS 9: Others in the law school and outside counsel from 2 different law firms with expertise in law governing sexual harassment policy and procedures disagree with the law school counsel.

WHEREAS 10: It is contended that the revised procedures would force respondents accused of sexual harassment, e.g. faculty members, to file civil actions against the University. There is no evidence to support this contention. There is, however, evidence to refute the contention, which is that such has not happened in the 4 years under the Interim Policy. Moreover, if the revised policy were to send respondents flocking to file civil actions, then the Senate version would force complainants to file civil actions against the University. The revised procedures are status neutral, equally fair to both parties. The revised procedures do not suggest a presumption of innocence on the part of the respondent and certainly not a presumption of guilt.

THE GEORGE WASHINGTON UNIVERSITY
Washington, DC

THE FACULTY SENATE

April 18, 2001

There will be a SPECIAL MEETING OF THE FACULTY SENATE ON FRIDAY, APRIL 27, 2001, AT 2:10 P.M. IN MARVIN CENTER 403, called by the President at the request of the Executive Committee, as directed by the Faculty Senate, for the purpose of continued consideration and vote during the current Senate Session on Resolution (00/6), "A Resolution on the Revised Draft of the Sexual Harassment Policies and Procedures."

AGENDA

- 1. Call to order**
- 2. Continued consideration of Resolution (00/6), A RESOLUTION ON THE REVISED DRAFT OF THE SEXUAL HARASSMENT POLICIES AND PROCEDURES; Professor Lilien F. Robinson, Chair, Professional Ethics and Academic Freedom Committee (Resolution 00/6 attached)**
- 3. Adjournment**


Tim Terpstra
Secretary

NOTE: The following documents are enclosed:

- 1. Sexual Harassment Policy and Procedures recommended by the Ad Hoc Committee, as amended by the Faculty Senate, April 14, April 21, and May 5, 2000**
- 2. Sexual Harassment Policy and Procedures as revised October 18, 2001, by the administration**
- 3. Sexual Harassment Policy and Procedures as further revised March 30, 2001, by the administration**

A RESOLUTION ON THE

REVISED DRAFT OF THE SEXUAL HARASSMENT POLICIES AND PROCEDURES (00/6)

WHEREAS, on October 27, 1997 the Vice President for Academic Affairs forwarded a draft of the Sexual Harassment Policies and Procedures to the Faculty Senate for its review and consideration; and

WHEREAS, the policy includes proscription of not only quid-pro-quo harassment but also of conduct that has the "effect" of creating an "intimidating, hostile, or offensive academic or work environment;" and

WHEREAS, good faith discussion of important academic matters relating to issues of gender may have such an effect on some students, while being regarded as desirable by other students and by faculty; and

WHEREAS, the Faculty Senate and its committees and its subcommittees, together with an Ad Hoc Committee of representatives of both administration and faculty, with the assistance of outside counsel provided by the administration also considered the Sexual Harassment Policies and Procedures, issuing a January 10, 2000 draft, and, following intense criticism by faculty members, including many from the Law School, a modified March 30, 2000 draft; and

WHEREAS, the Faculty Senate at three meetings intensively considered the proposal and recommended further changes ; and

WHEREAS, the administration then retained an additional outside law firm to review the proposed Policy and Procedures, and the firm recommended that the procedures be changed back largely to the January 10 Ad Hoc Committee draft, even though that draft had been later rejected by the Ad Hoc Committee, declared "deeply flawed" in a unanimous straw vote of 22 members of the Law School faculty and rejected by the Faculty Senate itself; and

WHEREAS, the administration's current "Revised Draft" eliminates basic fair process protections for those accused of harassment including:

- A. The right to a copy of the complaint
- B. The right to know the identity of the complainant
- C. The right to discover adverse hearsay documents and the names of adverse witnesses
- D. The right to a hearing prior to the imposition of any sanction without consent of the

accused

- E. The right to an independent, impartial decision-maker
- F. The right to confront and question persons giving adverse information
- G. The right to compel the attendance of witnesses, including the complainant, or to exclude evidence from persons unwilling or unable to appear
- H. The clear indication that the University, not the accused, has the burden of proof
- I. The right to a copy of the decision by the Coordinator, the special panel, or the University; and

WHEREAS, the Revised Draft is far less protective of the rights of faculty respondents than the Statement of Student Rights and Responsibilities, still to be applied in cases where students are the respondents; and

WHEREAS, the Faculty Senate has been advised by counsel from the Law School that the Revised Draft is not compelled by law, nor could government officials consistently with the Constitutional requirement of due process of law compel such procedures; and

WHEREAS, the "Revised Procedures" would force accused faculty members desiring to be afforded basic procedural rights to file civil actions against the University in court, thus subjecting the parties to unnecessary anxiety and expense, and

WHEREAS, an incorrect finding of sexual harassment may unjustly end an academic career; and

WHEREAS, the procedures would encourage risk-averse faculty to eliminate all controversial material relating to issues of gender from their syllabi and class discussions and to refrain from employment of research assistants of the opposite sex

NOW, THEREFORE, BE IT RESOLVED BY THE FACULTY SENATE OF THE GEORGE WASHINGTON UNIVERSITY THAT:

The Faculty Senate regards the Revised Draft as patently unfair to persons accused of sexual harassment.

The Faculty Senate believes the Revised Draft will chill freedom of academic expression and academic freedom.

The Faculty Senate withholds its formal approval of the Revised Draft

The Faculty Senate implores the University President to reject the Revised Draft

and accept the May 5, 2000 recommendation of the Faculty Senate.

Approved by the Committee on Professional Ethics and Academic Freedom
January 26, 2001

Postponed, April 13, 2001, to Special Senate Meeting, April 27, 2001

**A RESOLUTION TO ENDORSE THE POLICY AND PROCEDURES
GOVERNING SEXUAL HARASSMENT COMPLAINTS (99/6)**

WHEREAS, the Faculty Senate, in a meeting on December 11, 1998, passed a resolution to refer the Interim Policy and Procedures Governing Sexual Harassment Complaints to an Ad Hoc Committee for review; and

WHEREAS, the Ad Hoc Committee has reviewed the Interim Policy and Procedures and, based upon wide-ranging consultation, the study of sexual harassment policies from other institutions, the study of sexual harassment literature and court cases, has recommended changes to the Interim Policy and Procedures both in the interests of clarification and simplification and in substance; and

WHEREAS, the Faculty Senate resolution of December 11, 1998, directed the Ad Hoc Committee to report its recommendations with respect to any changes to the Interim Policy and Procedures Governing Sexual Harassment Complaints to the Faculty Senate;
NOW, THEREFORE

**BE IT RESOLVED BY THE FACULTY SENATE OF THE GEORGE WASHINGTON
UNIVERSITY**

That the Faculty Senate endorses the Policy and Procedures Governing Sexual Harassment Complaints as recommended by the Ad Hoc Committee.

Ad Hoc Committee to Review Interim Policy and
Procedures Governing Sexual Harassment Complaints
January 12, 2000

Postponed, March 10, 2000, to April 14, 2000

Recommitted, April 21, 2000, to Ad Hoc Committee

Adopted, as amended, May 5, 2000

[AS AMENDED BY THE FACULTY SENATE, April 14, April 21, & May 5, 2000]

AS RECOMMENDED BY THE AD HOC COMMITTEE ON POLICY AND PROCEDURES GOVERNING SEXUAL HARASSMENT COMPLAINTS

SEXUAL HARASSMENT POLICY AND PROCEDURES

First principles of this policy

The George Washington University is committed to maintaining a positive climate for study and work, in which individuals are judged solely on relevant factors, such as ability and performance, and can pursue their activities in an atmosphere that is free from coercion and intimidation. The University mission statement provides that the University "values a dynamic, student-focused community stimulated by cultural and intellectual diversity and built upon a foundation of integrity, creativity, and openness to exploration of new ideas." The University is committed to free inquiry, free expression, and the vigorous discussion and debate on which advancement of its mission depends. Sexual harassment is destructive of such a climate and will not be tolerated in the University community.

Objectives

This policy and these procedures aim to inform members of the University community what sexual harassment is and what they can do should they encounter or observe it. The University prohibits sexual harassment by any student, staff member, faculty member, and others in the University community; encourages reporting of sexual harassment before it becomes severe or pervasive; identifies accessible persons to whom sexual harassment may be reported; requires persons (whether faculty, staff or student) in supervisory or evaluative roles to report sexual harassment complaints to appropriate officials; prohibits retaliation against persons who bring sexual harassment complaints; assures confidentiality to the full extent consistent with the need to resolve the matter

appropriately; assures that allegations will be promptly, thoroughly, and impartially addressed; and provides for appropriate corrective action.

The ultimate goal is to prevent sexual harassment, through education and the continuing development of a sense of community. But if sexual harassment occurs, the University will respond firmly and fairly. As befits an academic community, the University's approach is to consider problems within an informal framework when appropriate, but to make formal procedures available for use when necessary.

What sexual harassment is

The University has adopted the following definition of sexual harassment, substantially derived from Equal Employment Opportunity Commission and Department of Education statements:

Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature when (1) submission to such conduct is explicitly or implicitly made a term or condition of academic participation or activity, educational advancement, or employment; (2) submission to or rejection of such conduct by an individual is used as the basis for employment or academic decisions that affect the individual; (3) such conduct has the purpose or effect of unreasonably interfering with an individual's academic or work performance or limiting participation in University programs; or (4) the intent or effect of such conduct is to create an intimidating, hostile, or offensive academic or work environment. Sexual harassment may occur without regard to either party's gender.

Nothing in this policy limits academic freedom, guaranteed by the Faculty Code, which is a pre-eminent value of the University. This policy shall not be interpreted to abridge academic freedom. Accordingly, in an academic setting expression that is reasonably designed or reasonably intended to contribute to academic inquiry, education or debate on issues of public concern shall not be construed as sexual harassment.

A person who commits sexual harassment in violation of this policy will be subject to disciplinary action, up to and including expulsion or termination.

Prevention; dissemination of information

The University is committed to preventing and remedying sexual harassment of students, faculty, and staff. To that end, this policy and these procedures will be disseminated in the University community. In addition, the University will sponsor programs to inform students, faculty, and staff about sexual harassment and the problems it causes; advise members of the University community of their rights and responsibilities under this policy and these procedures; and train personnel in the administration of the policy and procedures.

Consensual relationships

Relationships that are welcomed by the parties do not entail sexual harassment, and are beyond the scope of this policy. Whether a relationship is in fact welcomed will be gauged according to the circumstances; special risks are involved when one party -- whether a faculty member, staff member or student -- is in a position to evaluate or exercise authority over the other. Even when both parties previously consented to a sexual relationship, a charge of sexual harassment may be based on subsequent conduct that one of them does not welcome. Members of the University community are cautioned that consensual relationships, as well as relationships that are not consensual, can in some circumstances entail abuse of authority, conflict of interest, or other adverse consequences that may be addressed in accordance with pertinent University policy and practice.

What to do

Three procedural avenues of redress are available to members of the University community who believe that sexual harassment has occurred -- consultation, informal resolution, and formal complaint. Often, concerns can be resolved through consultation or informally resolved. If the matter is not satisfactorily resolved through the consultation or informal resolution procedure, a formal complaint may be initiated.

Consultation

A member of the University community who is uncomfortable with one or more instances of conduct of a sexual nature that may be inappropriate (even if the person is unsure whether the conduct constitutes sexual harassment), may discuss the matter with the person who has engaged in the behavior or with his or her department chair, dean, staff supervisor, or Dean of Students. Alternatively, or in addition, the offended person may seek University-level assistance by initiating consultation regarding the matter, by contacting the Office of the Vice President and General Counsel. That Office will assign a Coordinator to the case and arrange an initial consultation. The Coordinator will provide a copy of the sexual harassment policy and procedures, respond to questions about them, assist in developing strategies to deal with the matter, and work in accordance with the procedure set forth in Appendix A.

Alternatively, the individual may discuss the matter with the Director of the Office of Equal Employment Activities, the Dean of Students, or the Assistant Vice President in the Office of Faculty Recruitment and Personnel Relations, any of whom may determine the need to refer the matter to the Office of the Vice President and General Counsel, for assignment to a Coordinator.

Informal resolution procedure

An informal resolution procedure, which is initiated in the same manner as a consultation, entails an investigation by the Coordinator of the charges in accordance with Appendix B.

Formal complaint procedure

The formal complaint procedure is available when the informal resolution procedure fails to resolve satisfactorily the allegation of sexual harassment. The person who made the allegation of sexual harassment (the "Complainant"), the person against whom the allegation was made (the "Respondent") or a responsible University official may initiate a formal complaint.

A formal complaint is initiated by submitting to the Coordinator a signed, written request to proceed with a formal complaint. The request is due within 15 business days after the person

receives from the responsible University official a statement of the disposition of the informal resolution procedure. The Coordinator will inform the requesting party of the process that will be followed and provide a copy of the applicable procedure.

The Code of Student Conduct will govern the formal complaint procedure when both parties are students. The applicable staff grievance procedures will govern the formal complaint procedure when both parties are staff members. The formal complaint will be resolved in accordance with the Formal Complaint Procedures set forth in Appendix C, when: (a) the Complainant is a student and the Respondent a faculty or staff member; (b) the Complainant is a faculty member and the Respondent a staff member or student; (c) the Complainant is a staff member and the Respondent a faculty member or student; or (d) the Complainant and Respondent are faculty members.

Outcomes

If the informal resolution procedure or formal complaint procedure results in a determination that sexual harassment occurred, the findings and recommendations shall be referred to the appropriate University official for imposition of corrective action, including sanctions that the official is authorized to impose; provided that an informal resolution procedure may not result in a sanction unless the Respondent has consented thereto. A range of relevant considerations should be taken into account in determining the extent of sanctions, such as the severity of the offense, the effect of the offense on the victim and on the University community, the consequences of the sanction to the Respondent, and the offender's record of service and past offenses. Sanctions may include, but are not limited to, oral or written warning, suspension, expulsion, or termination of employment; provided that a tenured faculty member may not be dismissed except in accordance with the procedures set forth in the Faculty Code, Section F. The University may impose interim corrective action at any time, if doing so reasonably appears required to protect a member of the University community.

Redress of disciplinary action

Nothing in this policy or these procedures shall be deemed to revoke any right that any member of the University community may have to seek redress of a disciplinary action, such as a faculty member's right to maintain a grievance under the Faculty Code.

Confidentiality

The Coordinator and other investigators and decision-makers will strive to maintain confidentiality to the full extent appropriate, consistent with the need to resolve the matter effectively and fairly. The parties, persons interviewed in the investigation, persons notified of the investigation, and persons involved in the proceedings will be advised of the need for discretion and confidentiality. Inappropriate breaches of confidentiality may result in disciplinary action.

Retaliation

Retaliation against a person who reports, complains of, or provides information in a sexual harassment investigation or proceeding is prohibited. Alleged retaliation will be subject to investigation and may result in disciplinary action up to and including termination or expulsion.

False claims

A person who knowingly makes false allegations of sexual harassment, or who knowingly provides false information in a sexual harassment investigation or proceeding, will be subject to disciplinary action.

Time limits

The University aims to administer this policy and these procedures in an equitable and timely manner. Persons making allegations of sexual harassment are encouraged to come forward without undue delay. Established time limits may be extended for good cause, upon request.

Interpretation of policy

The Office of the Vice President and General Counsel is available to provide advice on questions regarding interpretation of this policy and these procedures.

Appendix A: Consultation Procedure

1. The consultation consists of one or more meetings between the Coordinator and the person who requests the consultation.
2. The Coordinator will provide a copy of the sexual harassment policy and procedures and respond to questions about them. The Coordinator may address and clarify the matter with the person, assist in developing strategies to deal with the matter, recommend counseling or other assistance, or determine that no further action is necessary.
3. The Coordinator will prepare a record of the consultation, which will be maintained by the Office of the Vice President and General Counsel. The record will be considered confidential to the full extent consistent with fairness and the University's need to take preventive and corrective action. If the record includes the name of a person against whom an allegation of sexual harassment has been made, the Office of the Vice President and General Counsel shall advise that person of the existence of the record. The file will not be revealed or released to any University authority outside the General Counsel's Office, nor will it be used in or otherwise affect any decisions regarding promotion, tenure, compensation, or other conditions of employment for faculty or staff, or the enrollment status and academic privileges of a student, unless a finding of sexual harassment has been made in accordance with these procedures.
4. When the Coordinator has reason to believe that criminal conduct may have occurred or that action is necessary to protect the health or safety of any individual, the University may, as the Office of the Vice President and General Counsel determines, refer the matter to appropriate authorities.

5. Although consultation may be requested and an informal resolution procedure pursued within any reasonable time after the events giving rise to the consultation or informal resolution procedure, persons who believe they have been subjected to or who otherwise have observed sexual harassment are encouraged to seek assistance from the University through these procedures promptly.

Appendix B: Informal Resolution Procedure

1. A person who requests consultation (the "Person") may pursue an informal resolution.
2. The Coordinator will ask the Person to provide a factual account of the alleged harassment. The Coordinator may assist the Person to prepare a signed statement. If the Person declines to provide a signed statement, the Coordinator will prepare a written summary of the Person's oral allegations.
3. The Coordinator will furnish the Respondent with a copy of the signed statement or the written summary if there is no signed statement. The Coordinator will inform the Respondent of the allegation in sufficient detail to permit an informed response.
4. The Coordinator will investigate the alleged harassment as promptly as circumstances permit, will afford the Respondent a reasonable opportunity to respond to the allegation, and will advise the parties and persons interviewed or notified about the alleged harassment of the need for discretion and confidentiality.
5. Upon initiating an investigation, the Coordinator will inform University officials who would be charged with recommending corrective and disciplinary action ("responsible University officials") of the informal resolution procedure.
6. Upon concluding the investigation, the Coordinator will report on the matter to the responsible University official. The Coordinator will make every effort to resolve the matter informally. The resolution of the matter may include corrective or disciplinary action provided the Respondent consents. Any such corrective or disciplinary action shall be imposed by the responsible University official and be

within his or her discretion and consistent with his or her authority.

7. A responsible official will notify the parties of the disposition of the informal resolution procedure to the extent consistent with University policies, appropriate considerations of privacy and confidentiality, fairness, and applicable law.
8. The Coordinator will report the outcome of the informal resolution procedure to the responsible University official. If the matter has not been resolved informally, the Person who alleged harassment, the Respondent, or a responsible University official may initiate the formal complaint procedure.

Appendix C: Formal Complaint Procedure -- Special Panels

A. Initiation of special panel procedure

1. If a formal complaint is governed by the special panel complaint procedure, the party requesting to proceed with a formal complaint must file a written request with the Coordinator. The request must be filed within 15 business days after receipt of information from a responsible University official of the disposition of the informal resolution procedure (See Appendix B). The written request for a formal hearing must include a factual statement of the sexual harassment alleged and may include a statement of the relief requested.
2. The Coordinator will send a copy of the complaint to the responding party and the Associate Vice President for Human Resources (or designee). The respondent will be given sufficient particularities as to the alleged facts that the respondent may reasonably investigate the charge and prepare his or her defense, with reasonable and appropriate recesses and continuances being provided to all parties. If, after providing the responding party with a reasonable opportunity to respond, the Associate Vice President for Human Resources (or designee), after consultation with the Office of the Vice President and General Counsel, finds that the action(s) alleged could not reasonably be found to constitute sexual harassment under applicable law even if true, the complaint shall be dismissed if the respondent consents to such dismissal. Otherwise the Formal Complaint Procedure as outlined herein will continue.
3. An aim of the special panel process is to complete, if feasible, the formal complaint procedure within 45 business days of the Coordinator's receipt of the formal complaint request.

B. Establishment of special panels

1. A complaint filed under Appendix C will be heard by a five-member panel selected by lot by the Associate

Vice President for Human Resources (or designee), as described in Section C. Panelists will be selected from a pool of 30, ten of whom are faculty members appointed by the Vice President for Academic Affairs, with the concurrence of the Council of Deans and the Faculty Senate Executive Committee; ten of whom are staff employees appointed by the Vice President for Administrative and Information Services; and ten of whom are students appointed by the Dean of Students.

2. Each appointee to the pool ordinarily will serve a two year term. The appointing official should stagger the appointments so that, if feasible, the terms of not more than five of his or her appointees expire in any year.
3. An appointee to the pool (but not to a panel) may be removed and replaced at any time, at the discretion of the appointing official. The appointing official should promptly fill vacancies in the pool or a panel, according to the procedure in Section B.1 above.
4. The Assistant Vice President in the Office of Faculty Recruitment and Personnel Relations and the Director of the Office of Equal Employment Activities and the Dean of Students, or their designees, will conduct mandatory training of all appointees to the pool at the time of appointment and periodically thereafter; provided that no pool member shall receive such training while serving on a special panel. Training will address roles and responsibilities of panel members, complaint procedures, applicable policies, and other techniques and standards pertinent to the complaint and hearing process.

C. Selection of panel

1. Within five business days of receiving the written request to proceed with a formal complaint (see A.2, above), the Associate Vice President for Human Resources (or designee) will select by lot the five-member panel from the pool. Four of the panel members will be from the same status group as the Respondent

and one panel member will be from the same status group as the Complainant. No member of a faculty member's department or of a staff member's administrative departmental organization may serve on the special panel. Within the five-day period, the Associate Vice President for Human Resources (or designee) will notify the Coordinator of the names of the special panel members.

2. The Coordinator will notify the parties of the panelists' names. Within three business days of receipt of the notice, either party may submit to the Associate Vice President for Human Resources a written objection to designation of any panel member. The objection must clearly state the reasons for the objection. The Associate Vice President may, at his or her discretion, replace a challenged panelist with another member of the pool from the same status group.
3. A designated panelist who at any time has or may reasonably be perceived as having a conflict of interest or is otherwise unable to serve on a special panel shall recuse himself or herself, and notify the Associate Vice President for Human Resources of the recusal.

D. Scheduling hearing

1. The special panel members will meet within five business days after their appointment, to select a chairperson and set the hearing date and time. The hearing will be held within a reasonable time, normally 20 business days, after the special panel is appointed. Panel members may not communicate with either party outside the presence of the other party.
2. The special panel chairperson will notify the parties of the hearing date, time, and location at least seven business days before the hearing. Within two business days after receiving notice of the hearing, a party with a scheduling conflict may submit to the chairperson a request for postponement. The chairperson, after consulting the special panel members, has discretion to reschedule the hearing.

All parties will be notified as soon as feasible if the hearing is rescheduled.

3. If a party does not appear for the hearing within 30 minutes after the scheduled time, the special panel will decide whether to reschedule the hearing or proceed.

E. Conduct of hearing

1. The special panel chairperson will preside at the hearing and decide procedural issues. Only persons participating in the proceeding may be present during the hearing except as otherwise provided in these procedures. The hearing will be conducted in the following sequence:
 - (a) Preliminary matters. The chairperson will introduce the parties, their counsel or advisors, and the special panel members; review the order of proceedings; explain procedures that govern use of the tape recorder; and present a brief summary of the complaint.
 - (b) Opening statements. The party who requested the hearing may make an opening statement. The responding party may then make an opening statement. Each opening statement shall not exceed 15 minutes.
 - (c) Presentation of complaint. The party who requested the hearing may present to the panel testimony, witnesses, documents or other evidence. Following the testimony of the party who requested the hearing, and of each witness, the responding party may ask questions.
 - (d) Response to complaint. The party who responded to the complaint shall have a right to know prior to the hearing the contents of and the names of the authors of any written statements that may be introduced against him or her, and to rebut unfavorable inferences that might be drawn from such statements. The responding party may present

testimony, witnesses, documents or other evidence to the panel. Following the testimony of the responding party, and of each witness, the party who requested the hearing may ask questions. Following the testimony of the responding party, and of each witness, the party who requested the hearing may ask questions.

- (e) Closing statements. The party who requested the hearing may make a closing statement. The responding party may then make a closing statement. Each closing statement shall not exceed 15 minutes.
- 2. Special panel members may ask questions of parties or witnesses at any time during the hearing.
- 3. The hearing will not be conducted according to strict rules of evidence. However, the special panel chairperson may limit or exclude irrelevant or repetitive testimony, and may otherwise rule on what evidence may be offered.
- 4. When the hearing cannot be completed in one session, the special panel chairperson may continue the hearing to a later date and time.
- 5. The hearing will be recorded on audiotape. Either party may obtain from the Coordinator a copy of the recording at reasonable cost, on written request.

F. Witnesses

- 1. Each party (and the panel) may ask witnesses to testify at the hearing, but no person may be directed to testify other than the Complainant and any other person who gave evidence that has been considered by the panel. Information from persons able but unwilling to appear shall not be considered by the panel. Information from persons who cannot appear shall be subject to a ruling of admissibility by the Chair. The Chair may take reasonable steps to protect the witnesses against abuse or harassment, short of excusing their appearances.

2. At least three business days before the hearing, each party must provide the chairperson, the Coordinator and the other party a list of witnesses he or she intends to present at the hearing.
3. The special panel may request that additional witnesses appear. The Coordinator will, if feasible, arrange for the appearance of these witnesses.
4. Each party is responsible for notifying its witnesses of the hearing date, time, and location. A hearing will not necessarily be postponed because a witness fails to appear.
5. All witnesses will be excluded from the hearing before and after their testimony. A witness may be recalled at the discretion of the special panel chairperson.
6. A University employee must obtain permission from his or her supervisor to be absent from work to appear at a hearing. Employees will be paid while appearing at a hearing during working hours, but not for other time spent on the complaint during or outside working hours.
7. A student must obtain permission from his or her professor to be absent from class to appear at a hearing.
8. Supervisors and professors should be aware of the importance of hearings and not unreasonably withhold permission to appear at a hearing. If an employee or student needs assistance in obtaining permission to appear at a hearing, he or she should contact the Coordinator.

G. Advisors

1. Each party may be accompanied by not more than two advisors, who may be University employees or other persons the party selects; provided that not more than one of the advisors shall be acting in an attorney capacity.
2. No advisor may speak on behalf of the party, make an opening or closing statement, present testimony or

examine witnesses. The advisor's role is limited to assisting the party to prepare for the hearing and providing the party private advice during the hearing.

3. Notwithstanding the preceding paragraph, when a party is a faculty member and has active representation, the other party will also be allowed active representation. In that event each party shall identify one attorney, or other advisor, who throughout the proceeding may (but shall not be required to) speak on behalf of the party, make opening and closing statements, and examine witnesses.
4. A Complainant or Respondent who plans to be accompanied by an attorney or other advisor at the hearing must notify the Coordinator and the other party at least five business days before the hearing.
5. The special panel may request or the University may provide a University-furnished attorney or other advisor to be present at any hearing to advise the special panel.
6. The University may have an observer present at any hearing.

H. Decision after hearing

1. After the hearing, the special panel will meet in closed session to review the hearing and make a decision on the complaint, consistent with the substantial weight of the evidence. The decision must be approved by four-fifths of the special panel members. If the special panel concludes that sexual harassment occurred, it may recommend corrective or disciplinary action. The recommendation must be approved by a majority of the special panel members.
2. The special panel report of its decision must be in writing and set forth findings of fact, conclusions, and, where appropriate, recommendations for corrective or disciplinary action.

3. The special panel will submit the report of its decision to the Associate Vice President for Human Resources within ten business days after the hearing ends.
4. If the special panel concludes that sexual harassment occurred, the Associate Vice President for Human Resources will forward a copy of the special panel report to a University official responsible for implementing corrective or disciplinary action. After reviewing the special panel report, a responsible University official will decide whether to impose corrective or disciplinary action, consistent with that official's authority. Before issuing a final decision, the responsible University official will advise the Respondent of the proposed sanction, will permit the Respondent to review all parts of the special panel report on which the sanction is based, and will give the Respondent a reasonable opportunity to reply before the sanction is imposed. A responsible University official will notify the parties of the disposition, to the extent consistent with University policies, appropriate considerations of privacy and confidentiality, and applicable law. A responsible University official will send a copy of the special panel report to the parties (at their home addresses of record, by courier, overnight mail or certified mail, return receipt requested). The report sent to the parties may omit portions, to maintain consistency with University policies regarding confidentiality.

I. Review of special panel decision

1. A party dissatisfied with a special panel decision may submit a request for review to the Associate Vice President for Human Resources, who will transmit the request to the vice president(s) responsible for oversight of the status groups to which the parties belong. For example, when the Complainant is a staff member and the Respondent a faculty member, the Vice President for Administrative and Information Services and the Vice President for Academic Affairs will jointly review the matter; when Complainant and

Respondent are both faculty members, the Vice President for Academic Affairs will review the matter.

2. The request for review must be in writing and set forth reasons why the special panel decision should be modified or overturned. The review must be based on the hearing record and may not present new evidence or testimony.
3. The request for review must be submitted within 15 business days of the party's receipt of the special panel decision. If the request is not received by then, the special panel decision will be the final University decision on the complaint.
4. The Vice President(s) will strive to issue a final decision on the review within 20 business days following submission of the request for review. The decision of the Vice President(s) shall be the final decision on the complaint within the University.
5. When the special panel decision is final, or when the final decision on a review is issued, the Coordinator will provide a copy of it to the University official(s) responsible for implementing corrective or disciplinary action. Any corrective or disciplinary action taken shall be within the discretion and consistent with the authority of the responsible University official. A range of relevant considerations should be taken into account in determining the extent of sanctions, such as the severity of the offense, the effect of the offense on the victim and on the University community, the consequences of the sanction to the Respondent, and the offender's record of service and past offenses. Respondent will be promptly notified of the outcome.
6. A responsible University official will send a copy of the final decision to the parties (at their home addresses of record, by courier, overnight mail or certified mail, return receipt requested). The copy sent to the parties may omit portions, to maintain consistency with University policies regarding confidentiality.

3 January 2001

TO: Members of the Faculty Assembly
FR: Stephen Joel Trachtenberg
RE: Sexual Harassment Policy and Procedures



As many of you know, for some time now the University has been reviewing its current Interim Policy and Procedures Governing Sexual Harassment Complaints. (The Interim Policy is available on the web, at <http://www.gwu.edu/~vpgc/sexualharassment.html>). Periodic reviews of important institutional policies such as this one are to improve them and to address any new legal developments. We have now completed the review of the Interim Policy, which has resulted in a revised Sexual Harassment Policies and Procedures (the Revised Policy).

Faculty input was central to development of the Revised Policy. In fact, the genesis is the devoted, year-long work of the Ad Hoc Committee on Policy and Procedures Governing Sexual Harassment Complaints. The Committee, chaired by Edward Caress (CSAS) and Linda Gallo (SMHS), and composed primarily of faculty was appointed jointly by the Faculty Senate Executive Committee and Vice President Lehman. The Ad Hoc Committee, working with outside counsel expert in this complex area of law, consulted with many members of the University community and reported its recommendations to the Faculty Senate. The Senate then extensively considered and in some respects amended the Ad Hoc Committee's recommended text, culminating in the recommendation that the Faculty Senate adopted at its May 5, 2000 meeting. In light of the number and scope of revisions proposed in these successive reviews, it was necessary that the proposed policy be again reviewed for compliance with law. The University engaged a second expert law firm to provide an independent assessment of the legality of the May 5 Faculty Senate Recommendation. The resulting Revised Policy (attached) is based on the Faculty Senate Recommendation, revised only to comply with that firm's explicit and unambiguous legal advice.

Because I believe that the Revised Policy provides a fair, balanced, and reasoned approach that complies with current law, I am now prepared to adopt it as institutional policy and procedure for resolving allegations of sexual harassment. Before doing so, however, I welcome any comments you may have. I ask that your comments be submitted to Vice President for Academic Affairs Don Lehman in writing by no later than March 15, 2001. Don Lehman's office can provide additional information regarding the Revised Draft upon request.

BLACK-LINE COMPARISON OF 5/5/00 FACULTY
SENATE RECOMMENDATION (INCLUDING ALL
FACULTY SENATE AMENDMENTS) AND 10/18/00
REVISED DRAFT

~~[AS AMENDED BY THE FACULTY SENATE,
April 14, April 21, & May 5, 2000]~~

~~AS RECOMMENDED BY THE AD HOC COMMITTEE
ON POLICY AND PROCEDURES GOVERNING
SEXUAL HARASSMENT COMPLAINTS~~

[REVISED DRAFT, 10/18/00]

SEXUAL HARASSMENT POLICY AND PROCEDURES

[RECOMMENDED BY THE AD HOC COMMITTEE ON POLICY AND PROCEDURES
GOVERNING SEXUAL HARASSMENT COMPLAINTS, AS AMENDED BY THE
FACULTY SENATE, April 14, April 21, and May 5, 2000, and as
further amended by this draft]

First principles of this policy

The George Washington University is committed to maintaining a positive climate for study and work, in which individuals are judged solely on relevant factors, such as ability and performance, and can pursue their activities in an atmosphere that is free from coercion and intimidation. The University mission statement provides that the University "values a dynamic, student-focused community stimulated by cultural and intellectual diversity and built upon a foundation of integrity, creativity, and openness to exploration of new ideas." The University is committed to free inquiry, free expression, and the vigorous discussion and debate on which advancement of its mission depends. Sexual harassment is destructive of such a climate and will not be tolerated in the University community.

Objectives

This policy and these procedures aim to inform members of the University community what sexual harassment is and what they can do should they encounter or observe it. The University prohibits sexual harassment by any student, staff member, faculty member, and others in the University community;

encourages reporting of sexual harassment before it becomes severe or pervasive; identifies accessible persons to whom sexual harassment may be reported; requires persons (whether faculty, staff or student) in supervisory or evaluative roles to report sexual harassment complaints to appropriate officials; prohibits retaliation against persons who bring sexual harassment complaints; assures confidentiality to the full extent consistent with the need to resolve the matter appropriately; assures that allegations will be promptly, thoroughly, and impartially addressed; and provides for appropriate corrective action.

The ultimate goal is to prevent sexual harassment, through education and the continuing development of a sense of community. But if sexual harassment occurs, the University will respond firmly and fairly. As befits an academic community, the University's approach is to consider problems within an informal framework when appropriate, but to make formal procedures available for use when necessary.

What sexual harassment is

The University has adopted the following definition of sexual harassment, substantially derived from Equal Employment Opportunity Commission and Department of Education statements:

Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature when (1) submission to such conduct is explicitly or implicitly made a term or condition of academic participation or activity, educational advancement, or employment; (2) submission to or rejection of such conduct by an individual is used as the basis for employment or academic decisions that affect the individual; (3) such conduct has the purpose or effect of unreasonably interfering with an individual's academic or work performance or limiting participation in University programs; or (4) the intent or effect of such conduct is to create an intimidating, hostile, or offensive academic or work environment. Sexual harassment may occur without regard to either party's gender.

Nothing in this policy limits academic freedom, guaranteed by the Faculty Code, which is a pre-eminent value of the University. This policy shall not be interpreted to abridge academic freedom. Accordingly, in an academic setting expression that is reasonably designed or reasonably intended to contribute to academic inquiry, education or debate on issues of public concern shall not be construed as sexual harassment.

A person who commits sexual harassment in violation of this policy will be subject to disciplinary action, up to and including expulsion or termination.

Prevention; dissemination of information

The University is committed to preventing and remedying sexual harassment of students, faculty, and staff. To that end, this policy and these procedures will be disseminated in the University community. In addition, the University will sponsor programs to inform students, faculty, and staff about sexual harassment and the problems it causes; advise members of the University community of their rights and responsibilities under this policy and these procedures; and train personnel in the administration of the policy and procedures.

Consensual relationships

Relationships that are welcomed by the parties do not entail sexual harassment, and are beyond the scope of this policy. Whether a relationship is in fact welcomed will be gauged according to the circumstances; special risks are involved when one party -- whether a faculty member, staff member or student -- is in a position to evaluate or exercise authority over the other. Even when both parties previously consented to a sexual relationship, a charge of sexual harassment may be based on subsequent conduct that one of them does not welcome. Members of the University community are cautioned that consensual relationships, as well as relationships that are not consensual, can in some circumstances entail abuse of authority, conflict of interest, or other adverse consequences that may be addressed in accordance with pertinent University policy and practice.

What to do

Three procedural avenues of redress are available to members of the University community who believe that sexual harassment has occurred -- consultation, informal resolution, and formal complaint. Often, concerns can be resolved through consultation or informally resolved. If the matter is not satisfactorily resolved through the consultation or informal resolution procedure, a formal complaint may be initiated.

Consultation

A member of the University community who is uncomfortable with one or more instances of conduct of a sexual nature that may be inappropriate (even if the person is unsure whether the conduct constitutes sexual harassment), may discuss the matter with the person who has engaged in the behavior or with his or her department chair, dean, ~~staff supervisor, or Dean of Students.~~ Alternatively, ~~or in addition, the offended person may seek University-level assistance by initiating consultation regarding the matter, by contacting~~ or staff supervisor; the Associate Vice President and Dean of Students; the Director of the Office of Equal Employment Activities; the Assistant Vice President for Faculty Recruitment and Personnel Relations; or the Sexual Harassment Response Coordinator (in the Office of the Vice President and General Counsel. That Office will assign a Coordinator to the case and arrange an initial consultation), who shall be consulted when appropriate by any of the foregoing persons. The Coordinator will provide a copy of the sexual harassment policy and procedures, respond to questions about them, assist in developing strategies to deal with the matter, and work in accordance with the procedure set forth in Appendix A.

~~Alternatively, the individual may discuss the matter with the Director of the Office of Equal Employment Activities, the Dean of Students, or the Assistant Vice President in the Office of Faculty Recruitment and Personnel Relations, any of whom may determine the need to refer the matter to the Office of the Vice President and General Counsel, for assignment to a Coordinator.~~

Informal resolution procedure

An informal resolution procedure, which is initiated in the same manner as a consultation, entails an investigation by the Coordinator of the charges in accordance with Appendix B.

Formal complaint procedure

The formal complaint procedure is available when the informal resolution procedure fails to resolve satisfactorily the allegation of sexual harassment. The person who made the allegation of sexual harassment (the "Complainant"), the person against whom the allegation was made (the "Respondent") or a responsible University official may initiate a formal complaint.

A formal complaint is initiated by submitting to the Coordinator a signed, written request to proceed with a formal complaint. The request is due within 15 business days after the person receives from the responsible University official a statement of the disposition of the informal resolution procedure. The Coordinator will inform the requesting party of the process that will be followed and provide a copy of the applicable procedure.

The Code of Student Conduct will govern the formal complaint procedure when both parties are students. The applicable staff grievance procedures will govern the formal complaint procedure when both parties are staff members. The formal complaint will be resolved in accordance with the Formal Complaint Procedures set forth in Appendix C, when:

- (a) the Complainant is a student and the Respondent a faculty or staff member;
- (b) the Complainant is a faculty member and the Respondent a staff member or student;
- (c) the Complainant is a staff member and the Respondent a faculty member or student; or
- (d) the Complainant and Respondent are faculty members.

Outcomes

If the informal resolution procedure or formal complaint procedure results in a determination that sexual harassment occurred, the findings and recommendations shall be referred to the appropriate University official for imposition of corrective action, including sanctions that the official is authorized to impose; ~~provided that an informal resolution procedure may not result in a sanction unless the Respondent has consented thereto.~~ A range of relevant considerations should be taken into account in determining the extent of sanctions, such as the severity of the offense, the effect of the offense on the victim and on the University community, the consequences of the sanction to the Respondent, and the offender's record of service and past offenses. Sanctions may include, but are not limited to, oral or written warning, suspension, expulsion, or termination of employment; provided that a tenured faculty member may not be dismissed except in accordance with the procedures set forth in the Faculty Code, Section F. The University may impose interim corrective action at any time, if

doing so reasonably appears required to protect a member of the University community.

Redress of disciplinary action

Nothing in this policy or these procedures shall be deemed to revoke any right that any member of the University community may have to seek redress of a disciplinary action, such as a faculty member's right to maintain a grievance under the Faculty Code.

Confidentiality

The Coordinator and other investigators and decision-makers will strive to maintain confidentiality to the full extent appropriate, consistent with the need to resolve the matter effectively and fairly. The parties, persons interviewed in the investigation, persons notified of the investigation, and persons involved in the proceedings will be advised of the need for discretion and confidentiality. Inappropriate breaches of confidentiality may result in disciplinary action.

Retaliation

Retaliation against a person who reports, or complains of, or sexual harassment or who provides information in a sexual harassment investigation or proceeding is prohibited. Alleged retaliation will be subject to investigation and may result in disciplinary action up to and including termination or expulsion.

False claims

A person who knowingly makes false allegations of sexual harassment, or who knowingly provides false information in a sexual harassment investigation or proceeding, will be subject to disciplinary action.

Time limits

The University aims to administer this policy and these procedures in an equitable and timely manner. Established time limits may be extended for good cause, upon request. Persons making allegations of sexual harassment are encouraged to come forward without undue delay. ~~Established time limits may be extended for good cause, upon request.~~

Interpretation of policy

The Office of the Vice President and General Counsel is available to provide advice on questions regarding interpretation of this policy and these procedures.

Appendix A: Consultation Procedure

1. The consultation consists of one or more meetings between the Coordinator and the person who requests the consultation.
2. The Coordinator will provide a copy of the sexual harassment policy and procedures and respond to questions about them. The Coordinator may address and clarify the matter with the person, assist in developing strategies to deal with the matter, recommend counseling or other assistance, ~~or determine that no further action is necessary,~~ or initiate the informal resolution procedure under Appendix B.
3. The Coordinator will prepare a record of the consultation, which will be maintained by the Office of the Vice President and General Counsel. The record will be considered confidential to the full extent consistent with fairness and the University's need to take preventive and corrective action. ~~If the record includes the name of a person against whom an allegation of sexual harassment has been made, the Office of the Vice President and General Counsel shall advise that person of the existence of the record. The file will not be revealed or released to any University authority outside the General Counsel's Office, nor will it be used in or otherwise affect any decisions regarding promotion, tenure, compensation, or other conditions of employment for faculty or staff, or the enrollment status and academic privileges of a student, unless a finding of sexual harassment has been made in accordance with these procedures.~~
4. When the Coordinator has reason to believe that criminal conduct may have occurred or that action is necessary to protect the health or safety of any individual, the University may, as the Office of the Vice President and General Counsel determines, refer the matter to appropriate authorities.
5. Although consultation may be requested and an informal resolution procedure pursued within any reasonable time after the events giving rise to the consultation or informal resolution procedure, persons who believe they

have been subjected to or who otherwise have observed sexual harassment are encouraged to seek assistance from the University through these procedures promptly.

Appendix B: Informal Resolution Procedure

1. A person who requests consultation (the "Person") may pursue an informal resolution.
2. The Coordinator will ask the Person to provide a factual account of the alleged harassment. The Coordinator may assist the Person to prepare a signed statement. If the Person declines to provide a signed statement, the Coordinator will prepare a written summary of the Person's oral allegations.
3. The Coordinator will ~~furnish the Respondent with a copy of the signed statement or the written summary if there is no signed statement. The Coordinator will~~ inform the Respondent of the allegation in sufficient detail to permit an informed response.
4. The Coordinator will investigate the alleged harassment as promptly as circumstances permit, will afford the Respondent a reasonable opportunity to respond to the allegation, and will advise the parties and persons interviewed or notified about the alleged harassment of the need for discretion and confidentiality.
5. Upon initiating an investigation, the Coordinator ~~will~~ may inform University officials who would be charged with recommending corrective and disciplinary action ("responsible University officials") of the informal resolution procedure.
6. Upon concluding the investigation, the Coordinator will report on the matter to the responsible University official. The Coordinator will make every effort to resolve the matter informally. The resolution of the matter may include corrective or disciplinary action ~~provided the Respondent consents~~. Any such corrective or disciplinary action shall be imposed by the responsible University official and be within his or her discretion and consistent with his or her authority.
7. A responsible official will notify the parties of the disposition of the informal resolution procedure to the extent consistent with University policies, appropriate

considerations of privacy and confidentiality, fairness, and applicable law.

8. ~~The Coordinator will report the outcome~~ If dissatisfied with the disposition of the informal resolution procedure ~~to the responsible University official. If the matter has not been resolved informally,~~ the Person who alleged harassment, the Respondent, or a responsible University official may initiate the formal complaint procedure.

Appendix C: Formal Complaint Procedure -- Special Panels

A. Initiation of special panel procedure

1. If a formal complaint is governed by the special panel complaint procedure, the party requesting to proceed with a formal complaint must file a written request with the Coordinator. The request must be filed within 15 business days after receipt of information from a responsible University official of the disposition of the informal resolution procedure (See Appendix B). The written request for a formal hearing ~~must include a factual statement of the sexual harassment alleged~~ (the "complaint") must state why the disposition of the matter should be modified or overturned, and may include a statement of the relief requested.
2. The Coordinator will send a copy of the complaint to the responding party and the Associate Vice President for Human Resources (or designee). ~~The respondent will be given sufficient particularities as to the alleged facts that the respondent may reasonably investigate the charge and prepare his or her defense, with reasonable and appropriate recesses and continuances being provided to all parties. If, after providing the responding party with a reasonable opportunity to respond, the Associate Vice President for Human Resources (or designee), after consultation with the Office of the Vice President and General Counsel, finds that the action(s) alleged could not reasonably be found to constitute sexual harassment under applicable law even if true, the complaint shall be dismissed if the respondent consents to such dismissal. Otherwise the Formal Complaint Procedure as outlined herein will continue.~~
3. An aim of the special panel process is to complete, if feasible, the formal complaint procedure within 45 business days of the Coordinator's receipt of the formal complaint request.

B. Establishment of special panels

1. A complaint filed under Appendix C will be heard by a five-member panel selected by lot by the Associate Vice President for Human Resources (or designee), as described in Section C. Panelists will be selected from a pool of 30, ~~ten~~ 18, six of whom are faculty members appointed by the Vice President for Academic Affairs, ~~with the concurrence of~~ in consultation with the Council of Deans and the Faculty Senate Executive Committee; ~~ten~~ six of whom are staff employees appointed by the Associate Vice President for ~~Administrative and Information Services; and ten~~ Human Resources; and six of whom are students appointed by the Associate Vice President and Dean of Students.
2. Each appointee to the pool ordinarily will serve a two year term. The appointing official should stagger the appointments so that, if feasible, the terms of not more than five of his or her appointees expire in any year.
3. An appointee to the pool ~~(but not to a panel)~~ may be removed and replaced at any time, at the discretion of the appointing official. The appointing official should promptly fill vacancies in the pool ~~or a panel,~~ according to the procedure in Section B.1 above.
4. The Assistant Vice President ~~in the Office of~~ for Faculty Recruitment and Personnel Relations ~~and~~ the Director of ~~the Office of~~ Equal Employment Activities, and the Associate Vice President and Dean of Students, or their designees, will conduct mandatory training of all appointees to the pool at the time of appointment and periodically thereafter; ~~provided that no.~~ No pool member shall receive such training while serving on a special panel. Training will address roles and responsibilities of panel members, complaint procedures, applicable policies, and other techniques and standards pertinent to the complaint and hearing process.

C. Selection of panel

1. Within five business days of receiving the written request to proceed with a formal complaint (see A.2, above), the Associate Vice President for Human

Resources (or designee) will select by lot the five-member panel from the pool. ~~Four~~ Two of the panel members will be drawn from the same status group as the Respondent; and one two panel member members will be drawn from the same status group as the Complainant; and one panel member will be drawn from among the pool members in the remaining status groups. No member of a faculty member's department or of a staff member's administrative department organization may serve on the special panel. Within the five-day period, the Associate Vice President for Human Resources (or designee) will notify the Coordinator of the names of the special panel members.

2. The Coordinator will notify the parties of the panelists' names. Within three business days of receipt of the notice, either party may submit to the Associate Vice President for Human Resources a written objection to designation of any panel member. The objection must clearly state the reasons for the objection. The Associate Vice President may, at his or her discretion, replace a challenged panelist with another member of the pool from the same status group.
3. A designated panelist who at any time has or may reasonably be perceived as having a conflict of interest or is otherwise unable to serve on a special panel shall recuse himself or herself, and notify the Associate Vice President for Human Resources of the recusal. For sound reasons, which shall be disclosed to the parties and panel members, the Associate Vice President for Human Resources, in his or her discretion, may replace a panel member. The successor panel member shall be selected by lot by the Associate Vice President for Human Resources from among pool members of the replaced panel member's status group.

D. Scheduling hearing-Special panel organization

1. Within five business days after their appointment, special panel members will meet select a chairperson and review the request for a hearing.
2. The special panel may request clarification or additional information from the Coordinator or the parties, to assist in deciding whether to grant the request.

E. Summary decision

1. If the special panel determines that the reasons presented for overturning or modifying the findings or recommendations of the Coordinator lack substantial merit, it may, by majority vote of the panel, issue a summary decision that denies the request for a hearing and affirms the informal complaint process.
2. If the special panel denies the request for a hearing, its decision must be in writing and state the reasons for denial. The special panel will provide copies of its decision to the Coordinator, the University official responsible for implementing corrective or disciplinary action (which official shall, to the extent the official deems appropriate, provide copies to parties), and the Associate Vice President for Human Resources.
3. Within ten business days after receiving the special panel summary decision, the party who requested the hearing may appeal the decision to the Associate Vice President for Human Resources. The appeal must be in writing and set forth reasons why the decision should be overturned.
4. The Associate Vice President for Human Resources will review the record, including the request for hearing, the special panel summary decision, and the appeal. If the Associate Vice President determines that the special panel substantially complied with applicable procedures for summary denial of the request for a hearing, he or she must affirm the special panel decision.
5. If the Associate Vice President determines that the special panel summary decision was not made in substantial compliance with applicable procedures, he or she will appoint a new special panel from the remaining members of the special panel pool, in accordance with section C above. The new panel may issue a summary decision or proceed with the hearing process.

F. Scheduling hearing

1. The special panel members will meet. If the special panel grants the request for a hearing, it will set a

hearing date and time. If a new special panel is appointed to conduct a hearing after a summary decision is overturned, the panelists will meet within a reasonable time, normally within five business days after their appointment, to select a chairperson and set the hearing date and time. The hearing will be held within a reasonable time, normally 20 business days, after the special panel is appointed. Panel members may not communicate with either party outside the presence of the other party.

2. The special panel chairperson will notify the parties of the hearing date, time, and location at least seven business days before the hearing. Within two business days after receiving notice of the hearing, a party with a scheduling conflict may submit to the chairperson a request for postponement. The chairperson, after consulting the special panel members, has discretion to reschedule the hearing. All parties will be notified as soon as feasible if the hearing is rescheduled.
3. If a party does not appear for the hearing within 30 minutes after the scheduled time, the special panel will decide whether to reschedule the hearing or proceed.

F G. Conduct of hearing

1. The special panel chairperson will preside at the hearing and decide procedural issues. Only persons participating in the proceeding may be present during the hearing except as otherwise provided in these procedures. The hearing will be conducted in the following sequence:
 - (a) Preliminary matters. The chairperson will introduce the parties, their counsel or advisors, and the special panel members; review the order of proceedings; explain procedures that govern use of the tape recorder; and present a brief summary of the complaint.
 - (b) Opening statements. The party who requested the hearing may make an opening statement. The responding party may then make an opening statement. Each opening statement shall not exceed 15 minutes.

- (c) Presentation of complaint. The party who requested the hearing may present to the panel testimony, witnesses, documents or other evidence. Following the testimony of the party who requested the hearing, and of each witness, the responding party may ask questions.
 - (d) Response to complaint. The party who responded to the complaint ~~shall have a right to know prior to the hearing the contents of and the names of the authors of any written statements that may be introduced against him or her, and to rebut unfavorable inferences that might be drawn from such statements.~~ The responding party may present testimony, witnesses, documents or other evidence to the panel. Following the testimony of the responding party, and of each witness, the party who requested the hearing may ask questions.
 - (e) Closing statements. The party who requested the hearing may make a closing statement. The responding party may then make a closing statement. Each closing statement shall not exceed 15 minutes.
- 2. Special panel members may ask questions of parties or witnesses at any time during the hearing.
 - 3. The hearing will not be conducted according to strict rules of evidence. However, the special panel chairperson may limit or exclude irrelevant or repetitive testimony, and may otherwise rule on what evidence may be offered.
 - 4. When the hearing cannot be completed in one session, the special panel chairperson may continue the hearing to a later date and time.
 - 5. The hearing will be recorded on audiotape. Either party may obtain from the Coordinator a copy of the recording at reasonable cost, on written request.

F H.Witnesses

- 1. Each party (and the panel) may ask witnesses to testify at the hearing, but no person may be ~~directed to testify other than the Complainant and any other person who gave evidence that has been considered by~~

~~the panel. Information from persons able but unwilling to appear shall not be considered by the panel. Information from persons who cannot appear shall be subject to a ruling of admissibility by the Chair. The Chair may take reasonable steps to protect the witnesses against abuse or harassment, short of excusing their appearances compelled to testify.~~

2. At least three business days before the hearing, each party must provide the chairperson, the Coordinator and the other party a list of witnesses he or she intends to present at the hearing.
3. The special panel may request that additional witnesses appear. The Coordinator will, if feasible, arrange for the appearance of these witnesses.
4. Each party is responsible for notifying its witnesses of the hearing date, time, and location. A hearing will not necessarily be postponed because a witness fails to appear.
5. All witnesses will be excluded from the hearing before and after their testimony. A witness may be recalled at the discretion of the special panel chairperson.
6. A University employee must obtain permission from his or her supervisor to be absent from work to appear at a hearing. Employees will be paid while appearing at a hearing during working hours, but not for other time spent on the complaint during or outside working hours.
7. A student must obtain permission from his or her professor to be absent from class to appear at a hearing.
8. Supervisors and professors should be aware of the importance of hearings and not unreasonably withhold permission to appear at a hearing. If an employee or student needs assistance in obtaining permission to appear at a hearing, he or she should contact the Coordinator.

G I. Advisors

1. Each party may be accompanied by not more than two advisors, who may be University employees or other

persons the party selects; provided that not more than one of the advisors shall be acting in an attorney capacity.

2. No advisor may speak on behalf of the party, make an opening or closing statement, present testimony or examine witnesses. The advisor's role is limited to assisting the party to prepare for the hearing and providing the party private advice during the hearing.
3. Notwithstanding the preceding paragraph, when a party is a faculty member and has active representation, the other party will also be allowed active representation. In that event each party shall identify one attorney, or other advisor, who throughout the proceeding may (but shall not be required to) speak on behalf of the party, make opening and closing statements, and examine witnesses.
4. A Complainant or Respondent who plans to be accompanied by an attorney or other advisor at the hearing must notify the Coordinator and the other party at least five business days before the hearing.
5. The special panel may request or the University may provide a University-furnished attorney or other advisor to be present at any hearing to advise the special panel.
6. The University may have an observer present at any hearing.

H J. Decision after hearing

1. After the hearing, the special panel will meet in closed session to review the hearing and make a decision on the complaint, consistent with the substantial weight of the evidence. The decision must be approved by ~~four-fifths of the special panel members. If the special panel concludes that sexual harassment occurred, it may recommend corrective or disciplinary action. The recommendation must be approved by~~ a majority of the special panel members.
2. The special panel report of its decision must be in writing and set forth findings of fact, conclusions, and, where appropriate, recommendations for corrective or disciplinary action.

3. The special panel will submit the report of its decision to the Associate Vice President for Human Resources within ten business days after the hearing ends.
4. If the special panel concludes that sexual harassment occurred, the Associate Vice President for Human Resources will forward a copy of the special panel report to a University official responsible for implementing corrective or disciplinary action. After reviewing the special panel report, a responsible University official will decide whether to impose corrective or disciplinary action, consistent with that official's authority. ~~Before issuing a final decision, the responsible University official will advise the Respondent of the proposed sanction, will permit the Respondent to review all parts of the special panel report on which the sanction is based, and will give the Respondent a reasonable opportunity to reply before the sanction is imposed.~~ A responsible University official will notify the parties of the disposition, to the extent consistent with University policies, appropriate considerations of privacy and confidentiality, and applicable law. A responsible University official will may, in his or her discretion, send a copy of the special panel report to the parties (at their home addresses of record, by courier, overnight mail or certified mail, return receipt requested). The report sent to the parties may omit portions, to maintain consistency with University policies regarding confidentiality.

± K. Review of special panel decision

1. A party dissatisfied with a special panel decision may submit a request for review to the Associate Vice President for Human Resources, who will transmit the request to the vice president(s) responsible for oversight of the status groups to which the parties belong. For example, when the Complainant is a staff member and the Respondent a faculty member, the Associate Vice President for ~~Administrative and Information Services~~ Human Resources and the Vice President for Academic Affairs will jointly review the matter; when Complainant and Respondent are both faculty members, the Vice President for Academic Affairs will review the matter.

2. The request for review must be in writing and set forth reasons why the special panel decision should be modified or overturned. The review must be based on the hearing record and may not present new evidence or testimony.
3. The request for review must be submitted within 15 business days of the party's receipt of the special panel decision. If the request is not received by then, the special panel decision will be the final University decision on the complaint.
4. The Vice President(s) will strive to issue a final decision on the review within 20 business days following submission of the request for review. The decision of the Vice President(s) shall be the final decision on the complaint within the University.
5. When the special panel decision is final, or when the final decision on a review is issued, the Coordinator will provide a copy of it to the University official(s) responsible for implementing corrective or disciplinary action. Any corrective or disciplinary action taken shall be within the discretion and consistent with the authority of the responsible University official. A range of relevant considerations should be taken into account in determining the extent of sanctions, such as the severity of the offense, the effect of the offense on the victim and on the University community, the consequences of the sanction to the Respondent, and the offender's record of service and past offenses. Respondent will be promptly notified of the outcome.
6. A responsible University official ~~will~~ may, in his or her discretion, send a copy of the final decision to the parties (at their home addresses of record, by courier, overnight mail or certified mail, return receipt requested). The copy sent to the parties may omit portions, to maintain consistency with University policies regarding confidentiality.

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On April 14, Professor John Banzhaf sent an electronic mail message to Professor Arthur Wilmarth requesting that his message be forwarded to this law firm for response. Professor Wilmarth sent it on to Vice President Lehman who forwarded the message to the General Counsel's office. We received the message on April 17.

Professor Banzhaf requests that we prepare an electronic copy of a single document showing the differences among the versions of the sexual harassment policy prepared by (1) the Ad Hoc Committee on Policy and Procedures Governing Sexual Harassment, in March 2000; (2) the Faculty Senate, in May 2000; and (3) this firm, in March 2001. A copy of that document and a key necessary to understanding its format is attached hereto.

Professor Banzhaf also requests responses to four questions based on our April 3, 2001 letter to President Trachtenberg. Although phrased somewhat differently, each of Professor Banzhaf's questions seeks support for the position that the University must permit the Coordinator to conduct an investigation and submit findings of fact to a responsible University official in order to satisfy its legal obligations under Title VII and Title IX. We understand that Mr. Banzhaf's real complaint is that the procedure permits the University to impose discipline after an investigation, rather than requiring an alleged victim of sexual harassment to prove his or her charges in a hearing before formal discipline can be administered.

Our November 28, 2000 letter to President Trachtenberg and its appendix, combined with our April 3, 2001 letter to President Trachtenberg, explain our concerns regarding the Faculty Senate's recommended sexual harassment policy, and support the alternative language that we recommend the University adopt. Nonetheless, we will reiterate briefly the reasoning supporting our advice that the Coordinator should have an investigative role and that corrective action should be taken without first awaiting the outcome of a full evidentiary hearing in which an alleged victim of sexual harassment would be compelled to participate.

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Judicial interpretations of Title VII have made clear that a sexual harassment policy must be "effective."¹ In order to be effective, the policy must include, among other things, a procedure that does not discourage victims of sexual harassment from coming forward, and a mechanism under which complaints made by alleged victims of sexual harassment are promptly and thoroughly investigated.² In addition, where sexual harassment is determined to have occurred, corrective action must be taken.³ Moreover, such action must be taken irrespective of the wishes of the victim to let the matter drop.⁴

The Amended Revised Draft enclosed with our April 3 letter assigns the necessary investigative function to the Coordinator. In order for the Coordinator to effectively participate in an investigation of the alleged sexual harassment, and for the University to take prompt corrective action, the Coordinator's findings must be reported to a responsible University official with authority to take corrective action. The Coordinator's report would include evidence presented by an alleged harasser in response to the allegations of harassment, which would be shared with him or her "in sufficient detail to permit an informed response." There are undoubtedly circumstances under which "sufficient detail" would include the identity of the alleged victim. A sexual harassment policy that required an alleged victim to participate in an evidentiary hearing before corrective action could be taken to stop and prevent sexual harassment would not be "effective." This is because it could dissuade from coming forward alleged victims that did not wish to subject themselves to the crucible of a full evidentiary hearing at which their

¹ Faragher v. City of Boca Raton, 524 U.S. 775, 118 S.Ct. 2275 (1998). See also Brown v. Perry, 184 F.3d 388, 396 (4th Cir. 1999); Reinhold v. Commonwealth of Virginia, 151 F.3d 172, 176 (4th Cir. 1998); Miller v. Woodharbor Molding & Millworks, Inc., 80 F. Supp.2d 1026, 1029 (N.D. Iowa 2000).

² Burlington Industries, Inc. v. Ellerth, 118 S.Ct. 2257, 2270 (1998); Smith v. First Union Nat'l Bank, 202 F.3d 234, 245 (4th Cir. 2000); Malik v. Carrier Corp., 202 F.3d 97, 105 (2nd Cir. 2000); Mockler v. Multnomah County, 140 F.3d 808, 813 (9th Cir. 1998); EEOC Compliance Manual (CCH) at 3256.

³ Wilson v. Tulsa Junior College, 164 F.3d 534, 542-43 (10th Cir. 1998); Adler v. Wal-Mart Stores, 144 F.3d 664, 676 (10th Cir. 1998); Mandy v. Quad/Graphics, Inc., 49 F.Supp.2d 1095, 1108-09 (E.D. Wis. 1999); EEOC Compliance Manual (CCH) at 3259.

⁴ Malik, 202 F.3d at 106 (2nd Cir. 2000); Lucero-Nelson v. Washington Metropolitan Transit Authority, 1 F.Supp.2d 1, 7 (D.D.C. 1998); EEOC Compliance Manual (CCH) at 3257.

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own conduct would be publicly scrutinized,⁵ and because it cedes to the victim the University's obligation to investigate allegations of sexual harassment and take corrective action irrespective of the wishes of the victim.

⁵ See Sarro v. City of Sacramento, 78 F.Supp.2d 1057, 1064, 1065 (E.D. Cal.1999).

Like with respect to Title VII, an educational institution can avoid liability under Title IX by having an effective sexual harassment policy. In addition, courts construing Title IX have held that the individual assigned to receive sexual harassment complaints must have authority to take corrective action.⁶ The Amended Revised Draft accommodates this requirement by ensuring that the Coordinator's findings are presented to a responsible University official with authority to take corrective action, where appropriate.⁷

Under the proposed policy, any party dissatisfied with the outcome of the Coordinator's investigation is entitled to a full evidentiary hearing, at which a panel must determine based on the "substantial weight of the evidence" whether sexual harassment occurred. A faculty member dissatisfied with the outcome of the full evidentiary hearing before the panel is entitled to file a grievance against the University under the Faculty Code and participate in an additional full evidentiary hearing. We believe that this procedure appropriately balances the legal requirement that the University promptly investigate allegations of sexual harassment in a manner that does not dissuade alleged victims from coming forward, with an alleged harasser's legitimate expectation that sufficient procedural protections will ensure a fair review of any adverse decision.

Finally, Professor Banzhaf requests that we provide him with copies of the written legal advice we provided to the University in connection with our analysis of the Faculty Senate's recommendations. Our November 28, 2000 letter to President Trachtenberg and its appendix, combined with our April 3, 2001 letter to President Trachtenberg, fully explain our suggested changes to the Faculty Senate recommendations and our reasons therefore. We understand that those documents were previously made available to the Executive Committee of the Faculty Senate.

Sincerely,

⁶ Litman v. George Mason University, 2001 U.S. Dist. LEXIS 2125 (E.D. Va. 2001).

⁷ However, the University could not terminate the employment of a tenured faculty member without first providing a hearing, in accordance with the Faculty Code.

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Peter Pantaleo
Gregg Avitabile

The attached document has been designed to reflect changes made to the Sexual Harassment policy during the course of three drafts. These three drafts are (1) the final 3/30/01 version; (2) the 5/00 Faculty Senate version; and (3) the 3/00 Ad Hoc Committee version.

Text appearing in normal type face and not surrounded by any symbols is text that was included in all three drafts.

Text that is underscored twice and surrounded by <> is new text added to the 3/30/01 version that was not included in either of the earlier versions.

Text appearing in italics and surrounded only by \\ is text that was included in both the Ad Hoc Committee version and the Faculty Senate version, and that has been deleted from the final 3/30/01 version.

Text appearing in italics and surrounded by both \\ and { } is text that was included in the 3/00 Ad Hoc Committee version, but was deleted from the Faculty Senate version and is also not included in the final 3/30/01 version.

Text that is surrounded by { }, but is not italicized, is text that was deleted from the Ad Hoc Committee version by the Faculty Senate, but has been returned to the final 3/30/01 version.

Text appearing in italics and surrounded by both [] and \\ is text that was added to the Ad Hoc Committee version by the Faculty Senate but deleted from the final 3/30/01 version.

Text that is surrounded by [] and is not italicized is text that was added to the Ad Hoc Committee version by the Faculty Senate and is also included in the final 3/30/01 version.

Brackets B [] and { } B are occasionally surrounded by \\. This means only that the brackets, which were created during the comparison between the Ad Hoc Committee and Faculty Senate versions, are not included in the final 3/30/01 version. There is no substantive significance to this byproduct of the process used to compare the three documents.

Due to the limitations of the comparite program, text sometimes appears to have been deleted, which, as is clear from the apparent addition of identical text in the same location, was not.

The following passage from page 5 of the document is illustrative.

Outcomes\

If the informal resolution procedure or formal complaint procedure results in a determination that sexual harassment occurred, the findings and recommendations shall be referred to the appropriate University official for imposition of corrective action, including sanctions that the official is authorized to impose\[/; *provided that an informal resolution procedure may not result in a sanction unless the Respondent has consented thereto*\. A range of relevant considerations \{may} [/should \/] be taken into account in determining the extent of sanctions, such as the severity of the offense, the effect of the offense on the victim and on the University community, \/[the consequences of the sanction to the Respondent, \/] and the offender's record of service and past offenses. Sanctions may include, but are not limited to, oral or written warning, suspension, expulsion, or termination of employment; provided that a tenured faculty member may not be dismissed except in accordance with the procedures set forth in the Faculty Code, Section F. The University may impose interim corrective action at any time, if doing so reasonably appears required to protect a member of the University community.

The normal face text contained in the first 4 lines up to the A\@ was included in the Ad Hoc Committee and Faculty Senate drafts, and retained in the final 3/30/01 draft.

The text: A[/; *provided that an informal resolution procedure may not result in a sanction unless the Respondent has consented thereto*]\.@ was added by the Faculty Senate to the Ad Hoc Committee draft (hence the brackets), but was deleted from the final 3/30/01 draft (hence the italics).

In the text: AA range of relevant considerations \{may} [/should \/] be taken into account in determining the extent of sanctions,@ the word Amay@ was included in the Ad Hoc Committee version, but deleted by the Faculty Senate from its version (hence the { }). The text

was also omitted from the final 3/30/01 version (hence it is italicized). The word *Ashould@* is surrounded by brackets and not italicized because it was added by the Faculty Senate and retained in the final 3/30/01 version. The bracket following the word *Ashould@* is surrounded by \ \ because it is a byproduct of the comparison program that is not contained in the final 3/30/01 version.

~~{[March 30, 2000.]}~~~~[[AS AMENDED BY THE FACULTY SENATE, April 14, April 21, & May 5, 2000]]~~

~~AS RECOMMENDED BY THE AD HOC COMMITTEE ON POLICY {AND PROCEDURES} [ANDPROCEDURES] GOVERNING SEXUAL HARASSMENT COMPLAINTS}}~~~~<[REVISED DRAFT, 3/30/01]>~~

SEXUAL HARASSMENT POLICY AND PROCEDURES
<[RECOMMENDED BY THE AD HOC COMMITTEE ON POLICY AND PROCEDURES GOVERNING SEXUAL HARASSMENT COMPLAINTS, AS AMENDED BY THE FACULTY SENATE, April 14, April 21, and May 5, 2000, and as further amended by this draft]>

First principles of this policy

The George Washington University is committed to maintaining a positive climate for study and work, in which individuals are judged solely on relevant factors, such as ability and performance, and can pursue their activities in an atmosphere that is free from coercion and intimidation. The University mission statement provides that the University "values a dynamic, student-focused community stimulated by cultural and intellectual diversity and built upon a foundation of integrity, creativity, and openness to exploration of new ideas." The University is committed to free inquiry, free expression, and the vigorous discussion and debate on which advancement of its mission depends. Sexual harassment is destructive of such a climate and will not be tolerated in the University community.

Objectives

This policy and these procedures aim to inform members of the University community what sexual harassment is and what they can do should they encounter or observe it. The University prohibits sexual harassment by any student, staff member, faculty member, and others in the University community; encourages reporting of sexual harassment before it becomes severe or pervasive; identifies accessible persons to whom sexual harassment may be reported; requires persons (whether faculty, staff or student) in supervisory or evaluative roles to report sexual harassment complaints to appropriate officials; prohibits retaliation against persons who bring sexual harassment complaints; assures confidentiality to the full extent consistent with the need to resolve the matter appropriately; assures that allegations will be promptly, thoroughly, and impartially addressed; and provides for appropriate corrective action.

The ultimate goal is to prevent sexual harassment, through education and the continuing development of a sense of community. But if sexual harassment occurs, the University will respond firmly and fairly. As befits an academic community, the University's approach is to

consider problems within an informal framework when appropriate, but to make formal procedures available for use when necessary.

What sexual harassment is

The University has adopted the following definition of sexual harassment, substantially derived from Equal Employment Opportunity Commission and Department of Education statements:

Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature when (1) submission to such conduct is explicitly or implicitly made a term or condition of academic participation or activity, educational advancement, or employment; (2) submission to or rejection of such conduct by an individual is used as the basis for employment or academic decisions that affect the individual; (3) such conduct has the purpose or effect of unreasonably interfering with an individual's academic or work performance or limiting participation in University programs; or (4) the intent or effect of such conduct is to create an intimidating, hostile, or offensive academic or work environment. Sexual harassment may occur without regard to either party's gender.

Nothing in this policy limits academic freedom, guaranteed by the Faculty Code, which is a pre-eminent value of the University. This policy shall not be interpreted to abridge academic freedom. Accordingly, in an academic setting expression that is reasonably designed or reasonably intended to contribute to academic inquiry, education or debate on issues of public concern shall not be construed as sexual harassment.

A person who commits sexual harassment in violation of this policy will be subject to disciplinary action, up to and including expulsion or termination.

Prevention; dissemination of information

The University is committed to preventing and remedying sexual harassment of students, faculty, and staff. To that end, this policy and these procedures will be disseminated in the University community. In addition, the University will sponsor programs to inform students, faculty, and staff about sexual harassment and the problems it causes; advise members of the University community of their rights and responsibilities under this policy and these procedures; and train personnel in the administration of the policy and procedures.

Consensual relationships

Relationships that are welcomed by the parties do not entail sexual harassment, and are beyond the scope of this policy. Whether a relationship is in fact welcomed will be gauged according to the circumstances; special risks are involved when one party -- whether a faculty member, staff member or student -- is in a position to evaluate or exercise authority over the other. Even when both parties previously consented to a sexual relationship, a charge of sexual harassment may be based on subsequent conduct that one of them does not welcome. Members of the University community are cautioned that consensual relationships, as well as relationships that are not consensual, can in some circumstances entail abuse of authority, conflict of interest, or other adverse consequences that may be addressed in accordance with pertinent University policy and practice.

What to do

Three procedural avenues of redress are available to members of the University community who believe that sexual harassment has occurred -- consultation, informal resolution, and formal complaint. Often, concerns can be resolved through consultation or informally resolved. If the matter is not satisfactorily resolved through the consultation or informal resolution procedure, a formal complaint may be initiated.

Consultation

A member of the University community who is uncomfortable with one or more instances of conduct of a sexual nature that may be inappropriate (even if the person is unsure whether the conduct constitutes sexual harassment), *{and who seeks the University's assistance, may initiate}* [may discuss the matter with the person who has engaged in the behavior or with his or her department chair, dean, staff supervisor, or Dean of Students. Alternatively, or in addition, the offended person may seek University-level assistance by initiating] consultation regarding the matter, by {

contacting <or staff supervisor; the Associate Vice President and Dean of Students; the Director of the Office of Equal Employment Activities; the Assistant Vice President for Faculty Recruitment and Personnel Relations; or the Sexual Harassment Response Coordinator (in> the Office of the Vice President and General Counsel. That Office will assign a Coordinator to the case and arrange an initial consultation\<), who shall be consulted when appropriate by any of the foregoing persons>. The Coordinator will provide a copy of the sexual harassment policy and procedures, respond to questions about them, assist in developing strategies to deal with the matter, and work in accordance with the procedure set forth in <Appendix A.>\{Appendix A} [Appendix A].

Alternatively, the individual may discuss the matter with the Director of the Office of Equal Employment Activities, the Dean of Students, or the Assistant Vice President in the Office of Faculty Recruitment and Personnel Relations, any of whom may determine the need to refer the matter to the Office of the Vice President and General Counsel, for assignment to a Coordinator.

Informal resolution procedure

An informal resolution procedure, which is initiated in the same manner as a consultation, entails an investigation by the Coordinator of the charges in accordance with Appendix B.

Formal complaint procedure

The formal complaint procedure is available when the informal resolution procedure fails to resolve satisfactorily the allegation of sexual harassment. The person who made the allegation of sexual harassment (the "Complainant"), the person against whom the allegation was made (the "Respondent") or a responsible University official may initiate a formal complaint.

A formal complaint is initiated by submitting to the Coordinator a signed, written request to proceed with a formal complaint. The request is due within 15 business days after the person

receives from the responsible University official a statement of the disposition of the informal resolution procedure. The Coordinator will inform the requesting party of the process that will be followed and provide a copy of the applicable procedure.

The Code of Student Conduct will govern the formal complaint procedure when both parties are students *{for when the Respondent is a student or a student organization, regardless of the status of the Complainant}*. The applicable staff grievance procedures will govern the formal complaint procedure when both parties are staff members. The formal complaint will be *{heard by a special panel,}* [resolved \/] in accordance with \/ the Formal Complaint Procedures set forth in \/ Appendix C, when: ≤

- ≥(a) the Complainant is a student and the Respondent a faculty or staff member; ≤
- ≥(b) the Complainant is a faculty member and the Respondent a staff member \/ or student \/; ≤
- ≥(c) the Complainant is a staff member and the Respondent a faculty member \/ or student \/; or ≤
- ≥(d) the Complainant and Respondent are faculty members.

Outcomes

If the informal resolution procedure or formal complaint procedure results in a determination that sexual harassment occurred, the findings and recommendations shall be referred to the appropriate University official for imposition of corrective action, including sanctions that the official is authorized to impose \/; *provided that an informal resolution procedure may not result in a sanction unless the Respondent has consented thereto* \/. A range of relevant considerations *{may}* \/ should \/ be taken into account in determining the extent of sanctions, such as the severity of the offense, the effect of the offense on the victim and on the University community, \/ the consequences of the sanction to the Respondent, \/ and the offender's record of service and past offenses. Sanctions may include, but are not limited to, oral or written warning, suspension, expulsion, or termination of employment; provided that a tenured faculty member may not be dismissed except in accordance with the procedures set forth in the Faculty Code, Section F. The University may impose interim corrective action at any time, if doing so reasonably appears required to protect a member of the University community.

Redress of disciplinary action

Nothing in this policy or these procedures shall be deemed to revoke any right that any member of the University community may have to seek redress of a disciplinary action, such as a faculty member's right to maintain a grievance under the Faculty Code.

Confidentiality

The Coordinator and other investigators and decision-makers will strive to maintain confidentiality to the full extent appropriate, consistent with the need to resolve the matter effectively and fairly. The parties, persons interviewed in the investigation, persons notified of the investigation, and persons involved in the proceedings will be advised of the need for discretion and confidentiality. Inappropriate breaches of confidentiality may result in disciplinary action.

Retaliation

Retaliation against a person who reports\, \<or> complains of\, or \<sexual harassment or who> provides information in a sexual harassment investigation or proceeding is prohibited. Alleged retaliation will be subject to investigation and may result in disciplinary action up to and including termination or expulsion.

False claims

A person who knowingly makes false allegations of sexual harassment, or who knowingly provides false information in a sexual harassment investigation or proceeding, will be subject to disciplinary action.

Time limits

The University aims to administer this policy and these procedures in an equitable and timely manner. <Established time limits may be extended for good cause, upon request.> Persons making allegations of sexual harassment are encouraged to come forward without undue delay. *\Established time limits may be extended for good cause, upon request.*

Interpretation of policy

The Office of the Vice President and General Counsel is available to provide advice on questions regarding interpretation of this policy and these procedures.

Appendix A: Consultation Procedure

1. 1 The consultation consists of one or more meetings between the Coordinator and the person who requests the consultation.
2. 1 The Coordinator will provide a copy of the sexual harassment policy and procedures and respond to questions about them. The Coordinator may address and clarify the matter with the person, assist in developing strategies to deal with the matter, recommend counseling or other assistance, ~~or~~ determine that no further action is necessary, or initiate the informal resolution procedure under Appendix B.
3. 3 The Coordinator will prepare a record of the consultation, which will be maintained by the Office of the Vice President and General Counsel. The record will be considered confidential to the full extent consistent with fairness and the University's need to take preventive and corrective action.
- If the record includes the name of a person against whom an allegation of sexual harassment has been made, the Office of the Vice President and General Counsel shall advise that person of the existence of the record. The file will not be revealed or released to any University authority outside the General Counsel's Office, nor will it be used in or otherwise affect any decisions regarding promotion, tenure, compensation, or other conditions of employment for faculty or staff, or the enrollment status and academic privileges of a student, unless a finding of sexual harassment has been made in accordance with these procedures.*
4. 4 When the Coordinator has reason to believe that criminal conduct may have occurred or that action is necessary to protect the health or safety of any individual, the University may, as the Office of the Vice President and General Counsel determines, refer the matter to appropriate authorities.
5. 1 Although consultation may be requested and an informal resolution procedure pursued within any reasonable time after the events giving rise to the consultation or informal resolution procedure, persons who believe they have been subjected to or who otherwise have observed sexual harassment are encouraged to seek assistance from the University through these procedures promptly.

Appendix B: Informal Resolution Procedure

1. A person who requests consultation (the "Person") may pursue an informal resolution.
2. The Coordinator will ask the Person to provide a factual account of the alleged harassment. The Coordinator may assist the Person to prepare a signed statement. If the Person declines to provide a signed statement, the Coordinator will prepare a written summary of the Person's oral allegations.
- 3.] *The Coordinator will {notify the Respondent that an allegation has been made} [furnish the Respondent with a copy of the signed statement or the written summary if there is no signed statement].* 3. The Coordinator will inform the Respondent of the allegation in sufficient detail to permit an informed response.
4. The Coordinator will investigate the alleged harassment as promptly as circumstances permit, will afford the Respondent a reasonable opportunity to respond to the allegation, and will advise the parties and persons interviewed or notified about the alleged harassment of the need for discretion and confidentiality.
5. Upon initiating an investigation, the Coordinator will ~~will~~ may inform University officials who would be charged with recommending corrective and disciplinary action ("responsible University officials") of the informal resolution procedure.
6. Upon concluding the investigation, the Coordinator will report his or her findings on the matter to the responsible University official. The Coordinator will make every effort to resolve the matter informally. *The among the parties, subject to the approval of the responsible University official. The informal* resolution of the matter may include corrective or disciplinary action *{to which} [provided] the Respondent consents. Any [such] Any such corrective or disciplinary action shall be imposed by the responsible University official and be within his or her discretion and consistent with his or her authority.*
7. If the Coordinator is unable to resolve the matter informally, the responsible University official shall determine, based on the report obtained from the Coordinator, whether or not to impose corrective or disciplinary action. Any corrective or disciplinary action imposed by the responsible University official shall be within his or her discretion and be consistent with his or her authority.
- 8.] 7. A responsible official will notify the *{person who alleged harassment} [parties]* parties of the disposition of the informal resolution procedure to the extent consistent with University policies, appropriate considerations of privacy and confidentiality, ~~fairness~~, and applicable law.
- 8.] *The Coordinator will report the outcome* 9. If dissatisfied with the disposition of the informal resolution procedure *to the responsible University official. If the matter has not been resolved informally*, the Person who alleged harassment, the Respondent, or a responsible University official may initiate the formal complaint procedure.

Appendix C: Formal Complaint Procedure -- Special Panels

A. Initiation of special panel procedure

1. If a formal complaint is governed by the special panel complaint procedure, the party requesting to proceed with a formal complaint must file a written request with the Coordinator. The request must be filed within 15 business days after receipt of information from a responsible University official of the disposition of the informal resolution procedure (See Appendix B). The written request for a formal hearing must include a factual statement of the sexual harassment alleged ~~<(the "complaint")~~ must state why the disposition of the matter should be modified or overturned. and may include a statement of the relief requested.
2. The Coordinator will send a copy of the complaint to the responding party and the Associate Vice President for Human Resources (or designee).
The respondent will be given sufficient particularities as to the alleged facts that the respondent may reasonably investigate the charge and prepare his or her defense, with reasonable and appropriate recesses and continuances being provided to all parties. If, after providing the responding party with a reasonable opportunity to respond, the Associate Vice President for Human Resources (or designee), after consultation with the Office of the Vice President and General Counsel, finds that the action(s) alleged could not reasonably be found to constitute sexual harassment under applicable law even if true, the complaint shall be dismissed if the respondent consents to such dismissal. Otherwise the Formal Complaint Procedure as outlined herein will continue.
3. <3. >An aim of the special panel process is to complete, if feasible, the formal complaint procedure within 45 business days of the Coordinator's receipt of the formal complaint request.

B. Establishment of special panels

1. A complaint filed under Appendix C will be heard by a five-member panel selected ~~by lot~~ by the Associate Vice President for Human Resources (or designee), as described in Section C. Panelists will be selected from a pool of ~~{20,} [30, ten]~~ <18, six> of whom ~~are~~ faculty members appointed by ~~the~~ the Vice President for Academic Affairs, ~~{in} [with the] concurrence {with} [of]~~ <in consultation with> the Council of Deans and the Faculty Senate Executive Committee ~~{, appoints ten faculty members; and} [; ten < six>]~~ of whom are staff employees appointed by <the Associate Vice President for Human Resources; and six> ~~the Vice President for Administrative and Information Services {appoints ten staff employees.~~

~~}; and ten\~~ of whom are students appointed by the <Associate Vice President and> Dean of Students.

2. \/\ Each appointee to the pool ordinarily will serve a two year term. The appointing official should stagger the appointments so that, if feasible, the terms of not more than five of his or her appointees expire in any year.
- 1/13. \/\ An appointee to the pool \/(but not to a panel)/\ may be removed and replaced at any time, at the discretion of the appointing official. The appointing official should promptly fill vacancies in the pool \/(or a panel)/\ according to the procedure in \{Section B.1\} /Section B.1 \/\ above.
- 1/14. \/\ The Assistant Vice President \in the Office of\ <for> Faculty Recruitment and Personnel Relations \and\<=> the Director of \the Office of\ Equal Employment Activities\ /<=> and the <Associate Vice President and> Dean of Students\ /\, or their designees, will conduct mandatory training of all appointees to the pool at the time of appointment and periodically thereafter\; **provided that no**\<=> **No**> pool member shall receive such training while serving on a special panel. Training will address roles and responsibilities of panel members, complaint procedures, applicable policies, and other techniques and standards pertinent to the complaint and hearing process.

C. Selection of panel

- 1/1. \/\ Within five business days of receiving the written request to proceed with a formal complaint (see A.2, above), the Associate Vice President for Human Resources (or designee) will \{appoint\} /select by lot \/\ the five-member panel from the pool. \{Five faculty members will be appointed when the Respondent is a faculty member. Five staff members will be appointed when the Respondent is a staff member\} [Four\ <Two> of the panel members will be <drawn> from the same status group as the Respondent \and one\<=> two> panel \member\ <members> will be <drawn> from the same status group as the Complainant\ /<=> and one panel member will be drawn from among the pool members in the remaining status groups>. No member of a faculty \{member's\} [member's\] <member=s> department or of a staff \{member's\} [member's\] <member=s> administrative \{departmental\} /department \ organization\ may serve on the special panel. Within the five-day period, the Associate Vice President for Human Resources (or designee) will notify the Coordinator of the names of the special panel members.
- 1/2. \/\ The Coordinator will notify the parties of the \panelists'\ <panelists=> names. Within three business days of receipt of the notice, either party may submit to the Associate Vice President for Human Resources a written objection to designation of any panel member. The objection must clearly state the reasons for the objection. The Associate Vice President may, at his or her discretion, replace a challenged panelist with another member of the pool from the same status group.
- 1/3. \/\ A designated panelist who \/(at any time \/\ has or may reasonably be perceived as having a conflict of interest or is otherwise unable to serve on a special panel shall recuse himself or herself, and notify the Associate Vice President for Human

Resources of the recusal. <For sound reasons, which shall be disclosed to the parties and panel members, the Associate Vice President for Human Resources, in his or her discretion, may replace a panel member. The successor panel member shall be selected by lot by the Associate Vice President for Human Resources from among pool members of the replaced panel member's status group.> \D.
Scheduling hearing

\[1.] The\ <D. Special panel organization

1. Within five business days after their appointment,> special panel members will
\meet\ <select a chairperson and review the request for a hearing.
2. The special panel may request clarification or additional information from the
Coordinator or the parties, to assist in deciding whether to grant the request.
Panel members may not communicate with either party outside the presence of the
other party.

E. Summary decision

1. If the special panel determines that the reasons presented for overturning or
modifying the findings or recommendations of the Coordinator lack substantial
merit, it may, by majority vote of the panel, issue a summary decision that denies
the request for a hearing and affirms the informal complaint process.
2. If the special panel denies the request for a hearing, its decision must be in writing
and state the reasons for denial. The special panel will provide copies of its
decision to the Coordinator, the University official responsible for implementing
corrective or disciplinary action (which official shall, to the extent the official
deems appropriate, provide copies to parties), and the Associate Vice President for
Human Resources.
3. Within ten business days after receiving the special panel summary decision, the
party who requested the hearing may appeal the decision to the Associate Vice
President for Human Resources. The appeal must be in writing and set forth
reasons why the decision should be overturned.
4. The Associate Vice President for Human Resources will review the record,
including the request for hearing, the special panel summary decision, and the
appeal. If the Associate Vice President determines that the special panel
substantially complied with applicable procedures for summary denial of the
request for a hearing, he or she must affirm the special panel decision.
5. If the Associate Vice President determines that the special panel summary decision
was not made in substantial compliance with applicable procedures, he or she will
appoint a new special panel from the remaining members of the special panel pool,
in accordance with section C above. The new panel may issue a summary decision
or proceed with the hearing process.

F. Scheduling hearing

1. If the special panel grants the request for a hearing, it will set a hearing date and time. If a new special panel is appointed to conduct a hearing after a summary decision is overturned, the panelists will meet within a reasonable time, normally within five business days after their appointment, to select a chairperson and set the hearing date and time. The hearing will be held within a reasonable time, normally <within> 20 business days\, after the special panel is appointed. Panel members may not communicate with either party outside the presence of the other party.

\2. \1 The special panel chairperson will notify the parties of the hearing date, time, and location at least seven business days before the hearing. Within two business days after receiving notice of the hearing, a party with a scheduling conflict may submit to the chairperson a request for postponement. The chairperson, after consulting the special panel members, has discretion to reschedule the hearing. All parties will be notified as soon as feasible if the hearing is rescheduled.

\3. \1 If a party does not appear for the hearing within 30 minutes after the scheduled time, the special panel will decide whether to reschedule the hearing or proceed.

\E\ <G>. Conduct of hearing

\1. \1 The special panel chairperson will preside at the hearing and decide procedural issues. Only persons participating in the proceeding may be present during the hearing except as otherwise provided in these procedures. The hearing will be conducted in the following sequence:

(a) Preliminary matters. The chairperson will introduce the parties, their counsel or advisors, and the special panel members; review the order of proceedings; explain procedures that govern use of the tape recorder; and present a brief summary of the complaint.

(b) Opening statements. The party who requested the hearing may make an opening statement. The responding party may then make an opening statement. Each opening statement shall not exceed 15 minutes.

(c) Presentation of complaint. The party who requested the hearing may present to the panel testimony, witnesses, documents or other evidence. Following the testimony of the party who requested the hearing, and of each witness, the responding party may ask questions.

(d) Response to complaint. The party who responded to the complaint \[shall have a right to know prior to the hearing the contents of and the names of the authors of any written statements that may be introduced against him or her, and to rebut unfavorable inferences that might be drawn from such statements. The responding party\] may present testimony, witnesses, documents or other evidence to the panel. Following the testimony of the responding party, and of each witness, the party who requested the hearing may ask questions.

- (e) Closing statements. The party who requested the hearing may make a closing statement. The responding party may then make a closing statement. Each closing statement shall not exceed 15 minutes.

- ✓12. ✓1 Special panel members may ask questions of parties or witnesses at any time during the hearing.
- ✓13. ✓1 The hearing will not be conducted according to strict rules of evidence. However, the special panel chairperson may limit or exclude irrelevant or repetitive testimony, and may otherwise rule on what evidence may be offered.
- ✓14. ✓1 When the hearing cannot be completed in one session, the special panel chairperson may continue the hearing to a later date and time.
- ✓15. ✓1 The hearing will be recorded on audiotape. Either party may obtain from the Coordinator a copy of the recording at reasonable cost, on written request.

✓F. ✓H. Witnesses

- ✓1. ✓1 Each party ✓1 (and the panel) ✓1 may ask witnesses to testify at the hearing, but no person may be ✓1 compelled to testify. ✓1 However, each party shall have a right to know prior to the hearing the contents of and the names of the authors of any written statements that may be introduced against him or her, and to rebut unfavorable inferences that might be drawn from such statements. ✓1 ✓1 *directed to testify other than the Complainant and any other person who gave evidence that has been considered by the panel. Information from persons able but unwilling to appear shall not be considered by the panel. Information from persons who cannot appear shall be subject to a ruling of admissibility by the Chair. The Chair may take reasonable steps to protect the witnesses against abuse or harassment, short of excusing their appearances. ✓1*
- ✓2. ✓1 ✓2. ✓1 ≥ At least three business days before the hearing, each party must provide the chairperson, the Coordinator and the other party a list of witnesses he or she intends to present at the hearing.
- ✓13. ✓1 The special panel may request that additional witnesses appear. The Coordinator will, if feasible, arrange for the appearance of these witnesses.
- ✓14. ✓1 Each party is responsible for notifying its witnesses of the hearing date, time, and location. A hearing will not necessarily be postponed because a witness fails to appear.
- ✓15. ✓1 All witnesses will be excluded from the hearing before and after their testimony. A witness may be recalled at the discretion of the special panel chairperson.
- ✓16. ✓1 A University employee must obtain permission from his or her supervisor to be absent from work to appear at a hearing. Employees will be paid while appearing at a hearing during working hours, but not for other time spent on the complaint during or outside working hours.
- ✓17. ✓1 A student must obtain permission from his or her professor to be absent from

class to appear at a hearing.

- \8. \ Supervisors and professors should be aware of the importance of hearings and not unreasonably withhold permission to appear at a hearing. If an employee or student needs assistance in obtaining permission to appear at a hearing, he or she should contact the Coordinator.

\G\ <I>. Advisors

- \1. \ Each party may be accompanied by not more than two advisors, who may be University employees or other persons the party selects; provided that not more than one of the advisors shall be acting in an attorney capacity.
- \2. \ No advisor may speak on behalf of the party, make an opening or closing statement, present testimony or examine witnesses. The advisor's role is limited to assisting the party \to \ prepare for the hearing and providing the party private advice during the hearing.
- \3. \ Notwithstanding the preceding paragraph, when a party is a faculty member and has active representation, the other party will also be allowed active representation. In that event each party shall identify one attorney, or other advisor, who throughout the proceeding may (but shall not be required to) speak on behalf of the party, make opening and closing statements, and examine witnesses.
- \4. \ A Complainant or Respondent who plans to be accompanied by an attorney or other advisor at the hearing must notify the Coordinator and the other party at least five business days before the hearing.
- \5. \ The special panel may request or the University may provide a University-furnished attorney or other advisor to be present at any hearing to advise the special panel.
- \6. \ The University may have an observer present at any hearing.

H <J>.

Decision after hearing

- /1. / After the hearing, the special panel will meet in closed session to review the hearing and make a decision on the complaint, consistent with the substantial weight of the evidence. The decision must be approved by {a majority} *[four-fifths]* of *[the]* special panel members. *If the special panel concludes that sexual harassment occurred, it may recommend corrective or disciplinary action. The recommendation must be approved by* a majority of the special panel members.
- /2. / The special panel report of its decision must be in writing and set forth findings of fact, conclusions, and, where appropriate, recommendations for corrective or disciplinary action.
- /3. / The special panel will submit the report of its decision to the Associate Vice President for Human Resources within ten business days after the hearing ends.
- /4. / If the special panel concludes that sexual harassment occurred, the Associate Vice President for Human Resources will forward a copy of the special panel report to a University official responsible for implementing corrective or disciplinary action. After reviewing the special panel report, a responsible University official will decide whether to impose corrective or disciplinary action, consistent with that official's authority. *Before issuing a final decision, the responsible University official will advise the Respondent of the proposed sanction, will permit the Respondent to review all parts of the special panel report on which the sanction is based, and will give the Respondent a reasonable opportunity to reply before the sanction is imposed.* A responsible University official will notify the parties of the disposition, to the extent consistent with University policies, appropriate considerations of privacy and confidentiality, and applicable law. A responsible University official *will* <may, in his or her discretion,> send a copy of the special panel report to the parties (at their home addresses of record, by courier, overnight mail or certified mail, return receipt requested). The report sent to the parties may omit portions, to maintain consistency with University policies regarding confidentiality.

I. {} <K.>

Review of special panel decision

1. A party dissatisfied with a special panel decision may submit a request for review to the Associate Vice President for Human Resources, who will transmit the request to the vice president(s) responsible for oversight of the status groups to which the parties belong. For example, when the Complainant is a staff member and the Respondent a faculty member, the <Associate> Vice President for *Administrative and Information Services* <Human Resources> and the Vice President for Academic Affairs will jointly review the matter; when Complainant and Respondent are both faculty members, the Vice President for Academic Affairs will review the matter.
2. The request for review must be in writing and set forth reasons why the special panel decision should be modified or overturned. The review must be based on

the hearing record and may not present new evidence or testimony.

3. The request for review must be submitted within 15 business days of the ~~{party's}~~ [party's \] receipt of the special panel decision. If the request is not received by then, the special panel decision will be the final University decision on the complaint.
4. The Vice President(s) will strive to issue a final decision on the review within 20 business days following submission of the request for review. The decision of the Vice President(s) shall be the final decision on the complaint within the University.
5. When the special panel decision is final, or when the final decision on a review is issued, the Coordinator will provide a copy of it to the University official(s) responsible for implementing corrective or disciplinary action. Any corrective or disciplinary action taken shall be within the discretion and consistent with the authority of the responsible University official. \A range of relevant considerations should be taken into account in determining the extent of sanctions, such as the severity of the offense, the effect of the offense on the victim and on the University community, the consequences of the sanction to the Respondent, and the offender's record of service and past offenses. Respondent will be promptly notified of the outcome.
6. A responsible University official ~~will~~ may, in his or her discretion, send a copy of the final decision to the parties (at their home addresses of record, by courier, overnight mail or certified mail, return receipt requested). The copy sent to the parties may omit portions, to maintain consistency with University policies regarding confidentiality.\]